Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Expanding the Economic and Innovation	)	Docket No. 12-268
Opportunities of Spectrum Through Incentive	)	
Auctions	)	

COMMENTS OF ABC TELEVISION AFFILIATES ASSOCIATION, CBS TELEVISION NETWORK AFFILIATES ASSOCIATION, FBC TELEVISION AFFILIATES ASSOCIATION, AND NBC TELEVISION AFFILIATES

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Summary

The Affiliates Associations recognize that the issues raised by implementation of the Spectrum Act are both technologically and logistically complex. They believe that the voluntary incentive auction and repacking processes stand the greatest chance of success if the implementation of the Act is made as streamlined and simple as possible. To that end, the Commission's rulemaking efforts should be guided by two overarching principles: *first*, that the Commission should follow Congress's direction and make every effort to preserve and protect existing local broadcast television service throughout the auction and repacking processes, and *second*, that the Commission's efforts should focus on producing a successful auction and repacking process.

With those principles in mind, the Affiliates Associations submit comments on several of the issues raised in the *Notice*:

The Affiliates Associations' comments underscore the importance of international coordination to the repacking process and the potential complexities of the negotiations necessary to carry out repacking. They note that the Spectrum Act requires international coordination to occur *before* the forward auction can be carried out and completed. The Commission's approach to technical issues attendant to frequency coordination in the border regions should remain flexible, consistent with the Commission's treatment of international coordination in other, similar contexts such as the DTV transition. Safeguards should be put in place to ensure that the requirements of international coordination do not adversely impact broadcasters through no fault of their own. In particular, the build-out and reimbursement deadlines and procedures should allow broadcasters to seek extensions of time or, if needed, toll construction permits to make any necessary changes to their facilities based on delays due to

international coordination that are beyond stations' control.

In keeping with its congressional mandate, the Commission should adopt rules to govern the repacking process that preserve to the fullest extent local broadcast television service, in keeping with the statutory mandate that the Commission "make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee." The Spectrum Act should be interpreted to require implementing rules that preserve the service area of and population served by those facilities actually licensed, or otherwise authorized and operating, by February 22, 2012.

The Affiliates Associations agree with the *Notice*'s proposal to permit the continued use of existing antenna patterns after repacking and submit that the Commission's goal should be genuine *replication* of stations' existing coverage areas in a new DTV Table of Allotments, with no more than a 0.5% variance in the geographic area covered pre- and post-repacking, so that at least 99.5% of the square kilometers covered post-repacking should be the same square kilometers covered pre-repacking. The Commission should nevertheless be mindful of the need for flexibility and thus allow stations to propose alternative transmission facilities to those specified by the Commission's replication software. The Affiliates Associations disagree with the proposal to consider a station's signal to be receivable at all locations within a station's noise-limited contour because that proposal would improperly ignore terrain losses.

With respect to population served, the Commission should adopt the second option proposed in the *Notice*: Service to the same specific viewers should be preserved, no individual channel reassignment should reduce the number of those viewers by more than 0.5%, and the "replacement" interference, calculated on a station-by-station basis, must have existed as of February 22, 2012. Such a rule most closely comports with the Spectrum Act and its

commitment that broadcasters not participating in the voluntary incentive auction be held harmless. The Affiliates Associations endorse the recommendation made by the National Association of Broadcasters ("NAB") that the aggregate amount of "replacement" interference not exceed 1%. The Commission should not adopt a separate standard for new interference in portions of a station's coverage area located outside the station's DMA.

Service provided by replacement digital television translators should be considered to be included within the population served by the associated full-power station and, thus, protected in the repacking. Full-power stations should continue to be permitted to apply for new replacement digital translators after repacking in order to restore service to any resulting loss areas. Indeed, because the Act mandates the preservation of service, replacement digital translator applications should be given special consideration in repacking and should have priority over other low power and translator applications.

Critical to the ultimate success of the forward and reverse auctions and subsequent repacking of television broadcast spectrum is the way in which the 600 MHz spectrum is reconfigured in a new band plan. The Affiliates Associations endorse the band plan being advanced by NAB, a plan that is largely consistent with a proposal presented in the *Notice* termed "Down from Channel 51." Under this plan, the 600 MHz uplink blocks are configured starting at Channel 51 downwards, followed by a duplex gap, and then followed by the 600 MHz downlink blocks. This contiguous wireless spectrum is then buffered by a *single* guard band from the new core television spectrum, which is interrupted only by existing Channel 37. The wireless blocks should be configured on a nationwide basis, rather than on a geographically variable basis.

This plan solves several real-world difficulties that arise from a split band plan with

geographically variable numbers of wireless blocks: Interference issues can be addressed by providing for one appropriately-sized nationwide guard band, it is far simpler to implement, and it is more spectrally efficient because it requires just one guard band instead of two. Complexities and costs in digital television receiver and wireless handset antenna design are minimized. This plan also allows for an appropriately-sized duplex gap for unlicensed devices and wireless microphones.

The repacking process is also intertwined with the reimbursement scheme. Because Congress intended that remaining broadcasters not be harmed by the auction and repacking processes and because Congress set aside a fixed amount that it believed would be sufficient to cover all reasonable costs incurred by those remaining broadcasters, the $1.75 billion TV Broadcaster Relocation Fund effectively serves as a "budget" for repacking. That budget number must be figured into the Commission's repacking model. Based on industry estimates of the costs to relocate television stations, the Commission should not plan on relocating more than 400 to 500 stations, for otherwise relocation costs will exceed the amount of the Fund Congress established to fully reimburse broadcasters.

Because reimbursement of station repacking expenses is subject to a statutory deadline, the Commission should deem the forward auction complete only when final licenses are granted to winning bidders in the forward auction, which should not be until or after the time at which television stations that are subject to being repacked actually file applications for construction permits to change channels. Given the nature and extent of any repacking, there will undoubtedly be—as there were during the DTV transition—stations that experience uncontrollable delays due to local zoning, international coordination, litigation, and force majeure events. Appropriate dispensation must be made for such stations so that they too may

timely construct new facilities and receive reimbursement from the Fund. The Affiliates Associations believe that the reimbursement component would best be served by the Commission appointing a third-party administrator to administer the Fund.

The Commission should also adopt an interpretation of expenses subject to reimbursement under the Act (including the non-exhaustive list of eligible expenses submitted by NAB) that will make remaining broadcasters whole, consistent with the statutory standard that all "costs reasonably incurred" in repacking are eligible for reimbursement. The *Notice*'s suggestion of a "minimum necessary costs standard" would be neither appropriate nor in keeping with the statute.

Finally, further study and analysis of the likely impact of repacking on LPTV stations will be needed in the future when more is known about the effects of spectrum repacking. In some markets, an LPTV station serves as the primary affiliate of the ABC, CBS, FOX, or NBC television network. Although the Spectrum Act requires the Commission to "make all reasonable efforts to preserve" only broadcast television service provided by full power and Class A stations, there is no statutory mandate to displace LPTV stations on a wholesale basis; to the contrary, the Act supports a continued vibrant broadcast television service after the auctions and repacking. The Commission should adopt, at the appropriate time, LPTV station displacement procedures similar to those adopted in connection with the digital television transition. In addition, the Commission should conduct a separate proceeding to consider selection priorities to minimize mutual exclusivity in displacement applications and to facilitate the provision of important over-the-air broadcast services.

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The ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates (the "Affiliates Associations")[1] submit these comments in response to the Notice of Proposed Rulemaking ("*Notice*"), released October 2, 2012,[2] seeking comment on the Commission's implementation of Title VI of the Middle Class Tax Relief and Job Creation Act of 2012 ("the Spectrum Act" or "Act").[3]

As the *Notice* explains, the Spectrum Act authorizes the Commission to conduct

[1] Each of the ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates is a non-profit trade association whose members consist of local television broadcast stations throughout the country that are affiliated with its respective broadcast television network.

[2] *See Expanding the Economic and Innovation Opportunities of Spectrum Through Incentive Auctions*, Notice of Proposed Rulemaking, FCC 12-118 (released Oct. 2, 2012) ("*Notice*").

[3] *See* PUB. L. NO. 112-96, 125 Stat. 156 (2012).

voluntary incentive auctions of broadcast television spectrum in order to free up licensed and unlicensed spectrum for wireless broadband use. The incentive auction process outlined in the *Notice* will have three major components, all of which must work together in order for the incentive auction contemplated by the Act to succeed.[4] The *Notice* seeks comment on a variety of issues affecting each of the three components, including (among others) designs for a new band plan and methodologies to repack the broadcast television bands following the auctions; the implementation of the statutory mandate that the Commission make "all reasonable efforts" to preserve existing local broadcast television service throughout the auction and repacking processes; the scope of and process for reimbursement of costs reasonably incurred by television broadcasters in connection with the repacking process; and the steps necessary to ensure minimal disruption to local television service in the course of implementation of the Act.[5] The *Notice* also invites comment "on goals and principles to guide [the Commission's] decisions" in implementing the Act.[6] The Affiliates Associations accordingly submit comments herein on a number of the discrete issues raised in the *Notice*, principally including the band plan, international coordination issues, the repacking process, and reimbursement of broadcaster costs.

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[4] *See Notice* at ¶ 5 (explaining that the Act envisions "(1) a 'reverse auction' in which broadcast television licensees submit bids to voluntarily relinquish spectrum usage rights in exchange for payment; (2) a reorganization or 'repacking' of the broadcast television bands in order to free up a portion of the ultra high frequency (UHF) band for other uses; and (3) a 'forward auction' of initial licenses for flexible use of the newly available spectrum." (citing Spectrum Act § 6403(a), (b), and (c))).

[5] *See Notice* at ¶¶ 6-9.

[6] *Notice* at ¶ 10.

I. Introduction

The Affiliates Associations recognize that the implementation of the Spectrum Act raises a host of issues that are both technologically and logistically complex, and we agree with other commenters that the voluntary incentive auction and repacking processes stand the greatest chance of success if the Commission endeavors to make implementation of the Act as streamlined and simple as possible. To that end, the Affiliates Associations suggest that the Commission's rulemaking efforts should be guided by two overarching principles: *first*, that every effort should be made to preserve and protect, to the greatest extent possible, valuable existing local broadcast television service throughout the auction and repacking processes, a goal that both the Commission and Congress have acknowledged is paramount,[7] and *second*, that the Commission's rulemaking process should be careful and deliberate, focused on producing a successful auction rather than on concluding the auction and repacking processes as quickly as possible.

If these principles guide the rulemaking effort, the resulting regulations are far more likely to serve one of the primary goals of the Spectrum Act: to ensure that highly-trusted and -valued local broadcast television programming remains as readily available to American viewers as it was on the date of the enactment.

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[7] *See* Spectrum Act § 6403(b)(2) (directing the Commission to "make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee"); *Notice* at ¶ 10 (describing as a "central" goal of the Commission the preservation of "a healthy, diverse broadcast television service").

A. The Commission's Rulemaking Must Be Guided by the Overarching Public Interest in Preserving Free, Over-the-Air Broadcast Television Service

Local broadcasters have long served the public interest by providing highly-valued, locally-oriented programming responsive to the specific needs and interests of the local communities they serve. That programming continues to be vital to viewers across the Nation.[8] Local broadcasters remain the go-to source for local news and investigative reporting[9]; coverage of local sports, weather, and traffic; and important local political and public affairs programming, including candidate debates and interviews.[10] They air public service announcements at no cost

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[8] Contrary to the suggestion in the *Notice* (at ¶ 14) that free, over-the-air broadcast television is declining in importance as viewers turn to "other offerings," recent statistics establish that more than 53 million consumers rely solely on free, over-the-air broadcast television, a number that is *growing*, not shrinking, due to the multiple and diverse offerings that local television stations provide in high-definition (HD) format, on multiple channels, and, increasingly, on mobile platforms. *See* Comments of the National Association of Broadcasters, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, MB Docket No. 12-203 (filed Sept. 10, 2012), at 10-13; NAB Press Release, *Over-the-Air TV Viewership Soars to 54 Million*, *available at* <http://www.nab.org/documents/newsroom/pressRelease.asp?id=2761> (June 18, 2012) (quoting GfK-Knowledge Networks, Home Technology Monitor 2012 Ownership Survey and Trend Report (Spring 2012)) (approximately 17.8 percent of television households rely solely on over-the-air broadcast television). The *Notice* does correctly acknowledge that local broadcast television service remains vital even to viewers who get locally-oriented television programming via cable or satellite services. *See Notice* at ¶ 14.

[9] *See Notice* at ¶ 14 (noting that 78 percent of Americans get their news from local broadcast television stations—"more than from newspapers, the Internet, or the radio").

[10] Americans get their local news from local television more than from any other source. *See* Pew Research Ctr., Pew Internet & American Life Project, Understanding the Participatory News Consumer 3 (Mar. 1, 2010), *available at* <http://www.pewinternet.org/~/media/ Files/Reports/2010/PIP_Understanding_the_Participatory_News_Consumer.pdf> (explaining that on a typical day, "78% of Americans say they get news from a local TV station"); Television Bureau of Advertising, TV Basics Report 25-26 (June 2012), *available at* <http://www.tvb.org/media/file/TV_Basics.pdf> ("TV Basics") (noting that most consumers choose local stations for this information); National USC Annenberg-Los Angeles Times Poll (continued . . .)

to promote community awareness of important issues, including health and wellness issues such as cancer prevention.[11] They air political and issue advertisements that provide an important vehicle by which candidates and interest groups advocate their positions to the viewing public. They also air commercial advertisements that drive small businesses and fuel local economies.

Network-affiliated stations, such as the members of the four Affiliates Associations, are not only the top local television stations in their markets but also provide high quality national network programming, including the most popular entertainment programming, network news, professional and college sports, the Olympics, the Academy Awards, etc.—in short, the programming the American people most want to watch.

Perhaps most critically, local television broadcasters provide emergency programming that serves as a veritable lifeline in times of crisis. Local television stations work hand-in-hand with local governments, charities, and first responders to help communities avoid, prepare for, and survive disasters, and they are the primary source of critical information and alerts during emergencies.[12] As just one recent illustration of that vital community service, during and in the

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Shows Local Television News Rules With Voters, USC Annenberg News (Aug. 24, 2012), *available at* <http://annenberg.usc.edu/News%20and%20Events/News/120824LATimesPoll .aspx> (reporting voters relying more on local broadcast television news for daily news than any other source); Pew Research Center for People & the Press, Further Decline in Credibility Ratings for Most News Organizations (Aug. 16, 2012), *available at* <http://www.people-press.org/files/2012/08/8-16-2012-Media-Believability1.pdf> (finding higher credibility ratings for local TV news outlets compared to cable news outlets).

[11] *See, e.g.*, Broadcasters Support Health Initiatives, Licensed To Serve: A Chronicle of Broadcasters' Community Service Initiatives, *available at* <http://www.nab.org/xert/2012Emails/publicservice/102012LTS.html> (October 2012) (compiling examples of broadcaster community outreach and service on health and wellness issues).

[12] Wireless telephone and broadband services cannot, as a technological matter, provide (continued . . .)

aftermath of the devastation wrought by Hurricane Sandy as it battered the northeast in October 2012, local broadcasters in affected areas provided round-the-clock lifesaving information to television viewers, including emergency updates and safety alerts; locations for obtaining shelter, food, water, and other supplies; transportation, flooding, and power restoration updates; and school and road closings.[13]

Congress plainly recognized the imperative of preserving and protecting that invaluable local broadcast television service in the Spectrum Act. The Act contains numerous provisions designed to ensure the continuation of local broadcast service and the preservation of local broadcasters' ability to provide valuable and trusted local programming throughout the auction and repacking processes, including the requirement that the Commission "make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee"[14] and the directive that the Commission "reimburse costs reasonably incurred by"

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the same reliable access to timely information and updates during emergencies because the enormous demands placed on wireless networks during emergencies often lead to failure.

[13] *See, e.g.*, Merrill Knox, *WNYW News Director Reflects on Hurricane Coverage* (Nov. 1, 2012) (describing local television station's extraordinary efforts in providing more than 100 hours of Hurricane Sandy coverage in four days); *Hurricane Sandy, Licensed To Serve: A Chronicle of Broadcasters' Community Service Initiatives*, *available at* <http://www.nab.org/xert/2012Emails/publicservice/sandyLTS.html> (compiling examples of Hurricane Sandy relief efforts nationwide). The emergency broadcasting provided before, during, and after Hurricane Sandy is the most recent, but by no means only, illustration of this critical community service provided by local broadcasters. The administrator for the Federal Emergency Management Agency made this telling observation prior to Hurricane Irene's August 2011 landfall: "Those local broadcasters are going to be giving you the best information, real time, from those local officials out of those press conferences. So make sure you['ve] got your radio and television." Interview by Ali Velshi with Craig Fugate, Administrator, Federal Emergency Management Agency, CNN American Morning (Aug. 25, 2011), *transcribed at* <http://transcripts.cnn.com/TRANSCRIPTS/1108/25/ltm.02.html>.

[14] Spectrum Act § 6403(b)(2).

broadcast television licensees in connection with the repacking process.[15] The legislative history makes clear that those provisions reflect a congressional determination to ensure that vital local broadcast television service remains unaffected, to the greatest extent possible, by the auction and repacking processes.[16] Taken together, the Act and its legislative history make clear that the Commission's implementing rules must be driven by the overarching importance of preserving local broadcast television service.[17]

The text of the Act and its legislative history confirm what long experience has taught:

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[15] Spectrum Act § 6403(b)(4)(a)(i).

[16] *See* Middle Class Tax Relief and Job Creation Act of 2012, 158 Cong. Rec. H. 907, 914 (Feb. 17, 2012) (Conf. Rep. on H.R. 3630) (statement of Rep. Walden) (observing that spectrum legislation "provides the best protection of any competing legislation to make sure American viewers can continue to watch programming and news from the Nation's free, over-the-air broadcasters, who just went through an expensive and difficult federally mandated conversion to digital"); Tax Relief and Job Creation Act, 158 Cong. Rec. S. 888, 889 (Feb. 17, 2012) (Conf. Rep.) (statement of Sen. Rockefeller) ("Broadcast television is critically important to communities across this country, and the steps Congress has taken today will make sure that residents relying on this free service do not see significant disruptions due to a lack of international coordination."); *id*. (noting that spectrum legislation will "preserve access to the free, over-the-air television that is so important [to] our communities").

[17] The Spectrum Act is not unique in its commitment to the preservation of local broadcast television service; both Congress and the Commission have repeatedly affirmed the importance of promoting and preserving locally-oriented broadcast television programming when legislating on issues affecting local broadcast stations. *See, e.g.*, Cable Television Consumer Protection and Competition Act, PUB. L. NO. 102-385, §§ 2(a)(10), 106 Stat. 1460, 1460-61 (1992) ("A primary objective and benefit of our Nation's system of regulation of television broadcasting is the local origination of programming. There is a substantial governmental interest in ensuring its continuation."); Intellectual Property and Communications Omnibus Reform Act of 1999, H.R. REP. NO. 106-464, at 92, 101 (Nov. 9, 1999) (Conf. Rep.) (containing Satellite Home Viewer Improvement Act) ("[T]elevision broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements, and information related to local activities."); *Broadcast Localism*, Report on Broadcast Localism and Notice of Proposed Rulemaking, 23 FCC Rcd 1324 (2007), ¶ 6 ("[O]ur broadcast regulatory framework is designed to foster a system of local stations that respond to the unique concerns and interests of audiences within the stations' respective service areas.").

Local television broadcasters are essential to the lifeblood of their local communities, providing news, sports, weather, traffic, political and public affairs, and emergency information that viewers across the Nation trust, value, and rely upon, as well as serving as engines of local commerce for businesses of all sizes. The Commission's implementation of the Spectrum Act's provisions should be guided at every turn by—indeed, should treat as a priority—a commitment to ensuring the continued availability of local broadcast television throughout the spectrum auction and repacking processes. A consistent focus on protecting local broadcast television service against disruption or decrease is not only faithful to the congressional commitment to local broadcast television reflected in the Act but also will guide and perhaps even simplify the Commission's admittedly complex rulemaking task.

B. The Commission's Rulemaking Efforts Should Focus on Producing a Successful Auction

The Commission should approach its rulemaking efforts in a deliberate, careful, and orderly fashion in order to ensure that the forward and reverse auctions can be conducted successfully, local broadcast television service is disrupted as minimally as possible during repacking, and local broadcasters are protected against the costs and burdens associated with the auction and repacking processes.

In recent months, major wireless service providers successfully have obtained or are in the process of obtaining additional wireless spectrum in the marketplace. In August 2012, the Commission approved four separate transactions in which Verizon Wireless acquired as much as 30 MHz of Advanced Wireless Service ("AWS") spectrum throughout much of the country from SpectrumCo, a joint venture that includes cable operators Comcast, Time Warner Cable, and

Bright House, as well as AWS spectrum from cable operator Cox Communications.[18] In October 2012, T-Mobile announced a merger with MetroPCS, a deal that will result in 110 MHz of spectrum in the merged entity.[19] In December 2012, Sprint Nextel Corp. announced its intent to acquire the rest of Clearwire Corp. (Sprint is its largest shareholder) and its substantial spectrum—about 100 MHz of spectrum in the top 100 markets.[20] Also in December, the

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[18] *See Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 Licenses et al.*, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698 (2012), ¶¶ 16-17 (noting that if the various applications are granted, "Verizon Wireless would hold an additional 20-30 megahertz of AWS-1 spectrum in 630 out of 734 CMAs nationwide" as a result of licenses assigned to Verizon from SpectrumCo and Cox as well as "an additional 10-20 megahertz of PCS spectrum and 10-30 megahertz of AWS-1 spectrum in 202 CMAs" as a result of licenses assigned to Verizon from Cricket and Savary; following approval, Verizon would assign certain licenses to T-Mobile, as a result of which assignments "T-Mobile would hold an additional 10-20 megahertz of AWS-1 spectrum in 125 CMAs, and Verizon Wireless would hold an additional 10-20 megahertz of AWS-1 spectrum in 17 CMAs"); *see also Verizon Wins FCC Approval for Spectrum Deals—With Caveats* (Aug. 23, 2012), *available at* <http://news.cnet.com/8301-13578_3-57499334-38/verizon-wins-fcc-approval-for-spectrum-deals-with-caveats/>.

[19] *See Deutsche Telekom AG, T-Mobile USA, Inc., and MetroPCS Communications, Inc. Seek FCC Consent to the Transfer of Control of PCS Licenses and AWS-1 Licenses and Leases, One 700 MHz License, and International 214 Authorizations Held by MetroPCS Communications, Inc. and by T-Mobile USA, Inc. to Deutsche Telekom AG*, Public Notice, DA 12-1730 (Oct. 26, 2012) ("Post-transaction, in markets in which there is geographical overlap the merged entity would hold a maximum of 110 megahertz of spectrum covering approximately 141 million people, or 46 percent of othe population of the mainland United States."); *see also Visualized: T-Mobile's Spectrum Gains from MetroPCS* (Oct. 5, 2012), *available at* <http://www.pcmag.com/article2/0,2817,2410568,00.asp>.

[20] *See SoftBank and Sprint Seek FCC Consent to the Transfer of Control of Various Licenses, Leases, and Authorizations from Sprint to SoftBank, and to the Grant of a Declaratory Ruling Under Section 310(B)(4) of the Communications Act*, Public Notice, DA 12-1924 (Nov. 30, 2012); *see also Clearwire Investor Crest to Urge FCC to Block Sprint/Clearwire Deal*, (Jan. 4, 2013), *available at* <http://www.fiercewireless.com/story/clearwire-investor-crest-urge-fcc-block-sprintclearwire-deal/2013-01-04> ("Sprint's acquisition of Clearwire, if approved, would give Sprint complete control over Clearwire's TD-LTE network deployment, set for next year. Clearwire commands around 160 MHz of spectrum in the top 100 markets. . . .); *Sprint to Acquire 100 Percent Ownership of Clearwire for $2.97 per Share* (Dec. 17, 2002), *available at*

(continued . . .)

Commission formally approved a plan that will allow AT&T to use at least 35 MHz of spectrum in the Wireless Communication Services ("WCS") band and at least 10 MHz of AWS spectrum to further its 4G LTE network rollout.[21] And in January 2013, AT&T announced its intent to acquire the assets of Atlantic Tele-Network, including 35 MHz of spectrum, mostly in the 850 MHz band, in certain rural areas of six states.[22]

The auction and repacking processes will be both technologically and logistically complex, as the *Notice* acknowledges. The Commission should not further complicate the rulemaking process by rushing to implement the forward and reverse auctions and the repacking process since the market appears to be responding appropriately to short-term demands for spectrum. Instead, the Commission can and should take the time to structure the auction and repacking processes in a way that maximizes the likelihood of success and is efficient, sensible, and fully protective of essential broadcast television service.

Because recent marketplace developments have provided the Commission with the breathing space to deliberate thoughtfully, the Commission's focus can be on crafting rules that

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<http://www.businesswire.com/news/home/20121217005581/en/Sprint-Acquire-100-Percent-Ownership-Clearwire-2.97> (reporting that "Clearwire's spectrum, when combined with Sprint's, will provide Sprint with an enhanced spectrum portfolio that will strengthen its position and increase competitiveness in the U.S. wireless industry").

[21] *See Applications of AT&T Mobility Spectrum LLC*, Memorandum Opinion and Order, FCC 12-156 (Dec. 18, 2012) (approving AT&T's purchase of 10 to 25 MHz of A-, B-, and/or C-block WCS spectrum from Comcast in 149 market areas; 10 MHz of A-block WCS spectrum from Horizon Wi-Com in 132 market areas; 5 to 30 MHz of A-, B-, C-, and/or D-block WCS spectrum from NextWave in 476 market areas; 10 to 30 MHz of AWS-1 spectrum from NextWave in 29 market areas; and 10 MHz of C- and D-block WCS spectrum from SDG&E in the San Diego market area).

[22] *See* Howard Buskirk, *AT&T Buying Old Alltel Assets Spun Off by Verizon*, COMM. DAILY (Jan. 23, 2013), at 1.

will make the auction and repacking processes successful, rather than on concluding the rulemaking as quickly as possible.

II. The Commission Should Adopt Rules for Repacking That Preserve and Protect Existing Broadcast Television Service

A. International Coordination Will Require Flexibility and Should Be Addressed Prior to the Release of a New DTV Table of Allotments

Proper international coordination will be critical to the success of the auction process. For the reasons expressed below, the Commission should commence international coordination efforts prior to repacking and the release of a new DTV Table of Allotments.

The *Notice* seeks comment on general technical considerations with regard to international coordination.[23] Operations in the 700 MHz band are subject to international agreements with Canada and Mexico.[24] The *Notice* acknowledges that modification of the existing 700 MHz band international arrangements or creation of new separate arrangements relating to the 600 MHz spectrum intended for wireless use will be necessary to implement 600 MHz operations in areas along the common borders and to protect these 600 MHz operations from cross-border interference.[25] Furthermore, modified domestic rules may also be needed to comply with any future agreements with Canada and Mexico regarding the use of the

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[23] *See Notice* at ¶ 197.

[24] *See* 47 C.F.R. § 27.57(b); International Agreements, *available at* <http://transition.fcc.gov/ib/sand/agree/> (collecting agreements concerning use of broadcast spectrum in the border regions).

[25] *See Notice* at ¶ 197.

600 MHz band.[26]

As an initial matter, the Spectrum Act requires that international coordination must occur *before* the forward auction can be carried out and completed. Section 6403(b)(1)(B) provides:

> For purposes of making available spectrum to carry out the forward auction under subsection (c)(1), the Commission . . . may, *subject to international coordination along the border with Mexico and Canada*—(i) make such reassignments of television channels as the Commission considers appropriate; and (ii) reallocate such portions of such spectrum as the Commission determines are available for reallocation.[27]

The plain meaning of the language of this provision is that international coordination is a statutory prerequisite before the forward auction may be carried out. Leaving international coordination to the end of the auction process would contravene the enabling statute.

The importance of coordination with Canada and Mexico to the Commission's auction proposals cannot be overstated. The spectrum auction cannot go forward without changes to international treaties, as the Commission acknowledges. As the Commission is well aware, in the case of the DTV transition, international coordination in some cases took many years to complete.[28]

Pursuant to agreements with Canada and Mexico, digital television allotments within 360 kilometers of the U.S.-Canadian border and 275 kilometers of the U.S.-Mexican border must be

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[26] *See Notice* at ¶ 197.

[27] Spectrum Act § 6403(b)(1)(B) (emphasis added); *see also Notice* at ¶ 29.

[28] One illustrative example is station WSMH(TV), for which international coordination of a DTV construction permit took more than eight years to complete. *See WSMH Licensee LLC*, Letter Decision, DA 08-1013 (MB 2008); *see also* FCC File No. BPCDT-19991028ACK (granted Apr. 28, 2008).

agreed to by each respective nation.[29] According to these agreements, there are approximately 795 negotiated U.S. DTV allotments within the Canadian border region, impacting approximately 441 assignments,[30] and approximately 115 negotiated U.S. DTV allotments within the Mexican border region.[31] A substantial number of these U.S. allotments may need to be renegotiated with Canada and Mexico, respectively, to proceed with the spectrum auction and repurposing of the 600 MHz band.[32] This negotiation will take time and the cooperation of each country and necessarily entails, at this early stage, a number of unknown variables.

Given that international treaties must be renegotiated to carry out the repacking of spectrum and the completion of the forward auction, the Affiliates Associations encourage the Commission to take a flexible approach to the technical issues attendant to frequency coordination in the border regions. Such flexibility is consistent with the Commission's

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[29] *See, e.g.*, Agreement Between the Government of the United States and the Government of Canada Relating to the Use of the 54-72 MHz, 76-88 MHz, 174-216 MHz and 470-806 MHz Bands for the Digital Television Broadcasting Service Along the Common Border (effective Dec. 15, 2008) ("2008 U.S.-Canada Agreement"); Letter of Understanding Between the Federal Communications Commission of the United States of America and Industry Canada Related to the Use of the 54-72 MHz, 76-88 MHz, 174-216 MHz and 470-806 MHz Bands for the Digital Television Broadcasting Service Along the Common Border (effective Sept. 22, 2000; amended effective Oct. 7, 2004); Memorandum of Understanding Between the Federal Communications Commission of the United States of America and the Secretaria de Comunicaciones y Transportes of the United Mexican States Related to the Use of the 54-72 MHz, 76-88 MHz, 174-216 MHz and 470-806 MHz Bands for the Digital Television Broadcasting Service Along the Common Border (effective July 22, 1998) ("1998 U.S.-Mexico Agreement").

[30] *See* 2008 U.S.-Canada Agreement, Table B.

[31] *See* 1998 U.S.-Mexico Agreement, Appendix 4.

[32] *See* Engineering Statement of Bernard R. Segal, P.E. ("*Segal Engineering Statement*") (attached hereto) at 7.

treatment of international coordination in other, similar contexts.

Indeed, the Commission used a flexible approach to international concerns in the DTV transition, and such an approach would be equally appropriate here. For example, in the final two years leading up to the DTV transition deadline for full-power stations, the Commission, in its 2007 *Third Periodic Review* proceeding, which set the filing requirements, deadlines, and other rules for the final stages of the DTV transition,[33] adopted modifications to its rules governing construction of post-transition DTV facilities in recognition that international coordination was delaying construction for some. There, in spite of the construction deadline adopted, the Commission amended Rule 73.3598(b)(3) to allow tolling of a DTV construction permit under two circumstances: (1) where the station could demonstrate that a request for international coordination had been sent to Canada or Mexico on behalf of the station and no response from the relevant county had been received, and (2) where the station could demonstrate that the DTV facility approved by Canada or Mexico would not permit the station to serve the viewers currently being served by the station's analog facility that would also be served by the station's DTV facility approved by the Commission domestically.[34] While the Commission generally directed stations to complete construction and commence operation with full-power DTV facilities by no later than February 17, 2009,[35] the Commission also determined

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[33] *See Third Periodic Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Report and Order, 23 FCC Rcd 2994 (2007) ("*Third Periodic Review*").

[34] *See Third Periodic Review* at ¶ 84; 47 C.F.R. § 73.3598(b)(3).

[35] The DTV deadline was later extended to June 12, 2009, by federal statute. *See* DTV Delay Act, PUB. L. NO. 111-4 (enacted Feb. 11, 2009).

that it would consider requests for extensions of time to construct DTV facilities where the resolution of international coordination issues was beyond the station's control.[36]

In addition, earlier in 2007, in a separate but related proceeding involving the adoption of the new DTV Table of Allotments,[37] the Commission granted flexible treatment to certain stations experiencing particular challenges related to frequency coordination in the border regions. There, the Commission recognized that "stations facing international coordination issues face unique challenges in completing the digital transition."[38] Accordingly, for example, the Commission granted a modification to an Ohio station's post-transition Appendix B DTV facility even after the station made a pre-election certification specifying a different facility and while the (maximized) facility was not yet operational. At the time of the certification in November 2004,[39] the station's then-pending maximization application, filed in May 2004,[40] remained subject to international coordination. The construction permit application was later amended in or around April 2005 to resolve international coordination issues,[41] but the new

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[36] *See Third Periodic Review* at ¶¶ 62, 78. Accordingly, FCC Form 337, Application for Extension of Time to Construct a Digital Television Broadcast Station, was amended to allow stations to request an extension of time to construct an authorized facility for international coordination reasons beyond the station's control. *See id.*, Appendix C.

[37] *See Advanced Television Systems and Their Impact Upon the Existing Television Service*, Seventh Report and Order and Eighth Further Notice of Proposed Rulemaking, 22 FCC Rcd 15581 (2007) ("*Seventh Report and Order*").

[38] *Seventh Report and Order* at ¶ 60.

[39] *See* FCC File No. BCERCT-20041103ACK.

[40] *See* FCC File No. BPCDT-20040526ABT.

[41] *See* FCC File No. BPCDT-20040526ABT (engineering amendment signed April 27, 2005).

application was predicted to cause otherwise impermissible interference to two other facilities. Evaluating the station's request to amend its post-transition maximized facility, the Commission stated:

> We will grant [the licensee's] request and change DTV Table Appendix B accordingly. . . . The change requested . . . is the result of a negotiated solution with Canada to resolve international coordination issues that prohibit operation of the facility proposed in the application pending at the time of certification and to which [the licensee] certified on FCC Form 381 [the DTV Pre-Election Certification]. The Commission has recognized that stations facing international coordination issues face unique challenges in completing the digital transition. As the result of a modification to a Canadian DTV allotment, [the licensee] states that it is precluded from constructing the facilities listed in the proposed DTV Table Appendix B. If we were to deny the change requested by [the licensee], [the station] would be required to identify a new facility and re-commence the process of obtaining international coordination for that facility. Because of the unique circumstances faced by [the station], a station that is already providing digital service to the public and seeks to improve that service, we believe that grant of the requested change to DTV Table Appendix B is warranted and will serve the public interest.[42]

Thus, the Commission exercised flexibility in allowing the station to make a change to its post-transition DTV facilities in order to preserve the public's access to broadcast television service in light of international coordination issues.

And, a few months earlier, in the DTV Table of Allotments proceeding, the Commission identified 242 stations in the border regions with tentative post-transition channel designations on channels other than their current digital channels, each of which would be required to file an application for the tentative designated channel following adoption of the Commission's rules

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[42] *Seventh Report and Order* at ¶ 61.

and policies in the *Third Periodic Review* discussed above.[43] Each of these 242 stations' post-transition DTV facilities was still subject to international coordination at that time. While the Commission stated it believed international coordination was proceeding in a manner that would allow the affected stations to construct their DTV facilities by the transition deadline, the FCC recognized that, in some cases, stations may need to proceed with construction of authorized facilities to the more limited extent approved by Canada or Mexico[44] (i.e., at parameters less than those requested). Yet, under certain circumstances, the Commission permitted stations after the DTV transition deadline to continue to file applications to maximize their facilities once frequency coordination with Canada and Mexico had been resolved.[45]

With the recent experience of the DTV transition as a salient guide, the Affiliates Associations urge the Commission to plan carefully for international coordination while recognizing that it is, to a great extent, outside of broadcaster—and even Commission—control. The Commission itself has recognized that "[r]esolving border area conflicts often involves compromises and multiple adjustments."[46] Safeguards must be put in place at the outset to ensure that the requirements of coordination with other nations do not adversely impact broadcasters who, after all and through no fault of their own, have no control over the timely

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[43] *See Seventh Report and Order* at ¶ 104 & Appendix D4.

[44] *See Seventh Report and Order* at ¶ 103.

[45] *See Implementation of DTV Delay Act et al.*, Second Report and Order and Notice of Proposed Rulemaking, 24 FCC Rcd 2526 (2009), ¶ 35.

[46] *Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Memorandum Opinion and Order on Reconsideration of the Seventh Report and Order and Eighth Report and Order, 23 FCC Rcd 4220 (2008), ¶ 137 (justifying its decision related to the Ohio station discussed above).

cooperation of foreign governments that may be encumbering spectrum in the border areas. At a minimum, the Affiliates Associations request that the Commission build in to the build-out and reimbursement deadlines and procedures the ability for broadcasters to seek extensions of time or, if needed, to toll construction permits to make any necessary changes to their facilities based on delays due to international coordination. Additionally, whatever construction deadlines are set, the Commission should allow stations to operate facilities at parameters within those agreed to by Canada and Mexico, with the opportunity to maximize those facilities[47] at a later time. The experience of the DTV transition has shown that such flexibility will, in some cases, be needed.

With regard to timing, the Affiliates Associations urge the Commission to adopt procedures in this proceeding that call for international coordination of domestic facilities *prior to* the release of a new DTV Table of Allotments. As discussed above, international coordination will involve renegotiation of international treaties involving more than 900 allotments. While the Commission will need to work expeditiously with the State Department to come to agreements with Canada and Mexico related to operations in the border regions, the principal task of frequency coordination should occur in conjunction with theoretical repacking and the development of a new DTV Table of Allotments.

Although theoretical repacking results in allotments that are still subject to change and, therefore, could require still further international coordination, if the Commission protects stations' existing coverage areas to within 0.5%, as advocated herein,[48] that *de minimis* amount of variance could be part of the negotiated coordination of allotments with Canada and Mexico.

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[47] *See* Section II.C herein related to replicating station coverage.

[48] *See* Section II.C, *infra*.

Of course, out of fairness to those broadcasters affected by international coordination issues, the cost reimbursement process must account for the delays that will be attendant to that process, notwithstanding the three-year statutory limitation on cost reimbursement, as discussed herein.[49]

B. The Spectrum Act Should Be Interpreted in a Manner Consistent with Its Plain Language and Congressional Intent to Preserve to the Fullest Extent Local Broadcast Television Service

With respect to repacking, the Spectrum Act requires that the Commission "shall make all reasonable efforts to preserve, as of the date of the enactment of this Act, the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission."[50] The Affiliates Associations agree with the *Notice*'s proposal that the statutory term "coverage area" means "service area," as used in OET Bulletin 69, that the term "service area" is the "geographic area within the station's noise-limited F(50,90) contour where its signal strength is predicted to exceed the noise-limited service level," and that "coverage area" and "service area" are not affected by interference from other television stations.[51]

In contrast to "coverage area" and "service area," the Affiliates Associations also agree that OET Bulletin 69 and the Commission's rules treat the "population served" by considering the effects of interference such that the "population served" refers to persons who reside within a

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[49] *See* Section IV.B, *infra*.

[50] Spectrum Act § 6403(b)(2).

[51] *See Notice* at ¶ 93 (citing OET Bulletin 69 and quoting 47 C.F.R. § 73.622(e)(1)); *see also Segal Engineering Statement* at 3-4.

station's service area at locations where the station's service area is *not* subject to interference from other television stations.[52]

The Affiliates Associations do not agree, however, that the Spectrum Act requires the Commission to use "all reasonable efforts" to preserve only the coverage area and population served of television facilities actually licensed (or for which an application for a license to cover was filed) by February 22, 2012, the date of enactment of the Spectrum Act,[53] or that the Spectrum Act permits the Commission to make such efforts to preserve only the protected contour of Class A television stations.[54] The *Notice*'s proposal is inconsistent with both the plain language and statutory purpose of the Act.

As an initial matter, it is an elementary canon of statutory construction that a statute should be interpreted to effectuate its purpose, not to frustrate that purpose.[55] The purpose of the Spectrum Act was to create an entirely voluntary opportunity for certain broadcasters to relinquish their spectrum rights in return for a monetary payment but to hold harmless those

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[52] *See Notice* at ¶ 94.

[53] *See Notice* at ¶ 98.

[54] *See Notice* at ¶ 99.

[55] "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose." *Morton v. Ruiz*, 415 U.S. 199, 237 (1974); *see also, e.g.*, *Volkswagenwerk Aktiengesellschaft v. Federal Maritime Comm'n*, 390 U.S. 261, 272 (1968) ("[C]ourts . . . 'are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute.'" (quoting *NLRB v. Brown*, 380 U.S. 278, 291 (1965))); *Black Citizens for a Fair Media v. FCC*, 719 F.2d 407, 423 (D.C. Cir. 1983) ("Implicit in every congressional delegation of power to interpret a statutory term is the limit that the agency interpretation be consistent with the congressional purposes expressed in the statutory scheme containing the term at issue.").

broadcasters that choose not to participate in the auction process.[56] To hold truly harmless non-participating broadcasters, the Commission should read the preservation provision in Section 6403(b)(2) to reflect this purpose, not in a limited fashion, as the *Notice* proposes.

The plain language of the Spectrum Act requires the Commission to make all reasonable efforts to preserve the coverage area and population served by a licensee as of February 22, 2012. This requires protection not only of those facilities actually licensed (or for which an application for a license to cover was filed) as of that date but also any other facilities that were actually serving viewers on that date, whether by program test authority, special temporary authority, experimental authority, or other lawful authority. The Spectrum Act uses the term "licensees" to refer to *who* must be protected (each broadcast television licensee), not *what* must be protected (a particular facility licensed as of February 22, 2012).[57] Had Congress intended the

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[56] *See* Conf. Rep. on H.R. 3630, Middle Class Tax Relief and Job Creation Act of 2012, 158 Cong. Rec. H. 907, 914 (Feb. 17, 2012) (statement of Rep. Walden) (noting that the Spectrum Act will ensure that "[o]ur TV broadcasters who will be asked in a voluntary auction if they want to give up their spectrum are protected so that the viewers out there in America will still be able to see and watch their over-the-air public and private broadcasters"); *id*. at 920 ("This is a voluntary incentive auction, so nobody is being forced off the airwaves . . . ."); Congressional Budget Office Cost Estimate, *Public Safety Spectrum and Wireless Innovation Act*, S. 911, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on June 8, 2011, p. 4 (July 20, 2011) (noting that S. 911 would "[a]ppropriate up to $1 billion from auction receipts" to create a fund "used to pay television broadcasters who do not relinquish their licenses for costs the FCC would impose to change their channel assignment as part of the process of clearing spectrum for nonbroadcast services"); *Promoting Broadband, Jobs and Economic Growth Through Commercial Spectrum Auctions: Hearing Before the House Energy & Commerce Comm.* (June 1, 2011) (Internal Memorandum) (discussing incentive auctions in which "[c]urrent licensees, such as broadcasters or satellite companies, would be given the opportunity to voluntarily return some or all of their spectrum in exchange for compensation" and noting that "[b]roadcasters emphasize that incentive auctions should be truly 'voluntary'" and should consider "how licensees wishing to retain their spectrum might be 'repacked' after other licensees voluntarily participate in incentive auctions").

[57] *See* Spectrum Act § 6001(6), § 6403(b)(2).

narrower interpretation proffered by the *Notice*, then it could have easily said that *only* "licensed facilities" would be protected.[58]

But even if the term "licensee" were (incorrectly) interpreted to mean "licensed facility," the plain language of the statute still would not support the *Notice*'s interpretation of the provision: The modifying clause "as of the date of the enactment of this Act" would not have followed "shall make all reasonable efforts to preserve" but instead would have followed "the coverage area and population served of each broadcast television licensee." By modifying the latter clause, the statutory language would have signaled that only the coverage area and population served as of February 22, 2012, should be preserved. But by modifying the earlier clause, the statute signals Congress's intent to preserve the status quo, and that status quo includes the Commission's normal processes, which Congress is presumed to know when it acts.[59] Because the actual repacking process is years away, allowing stations to complete construction, file for licenses to cover, and then have their new facilities protected in the repacking process will neither delay nor add any further complications to the repacking timeline or algorithm.

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[58] *See City of Milwaukee v. Illinois*, 451 U.S. 304, 329 n.22 (1981) (expressing judicial preference to "read [a] statute as written" because "Congress knows how to say 'nothing in this Act' when it means to"); *Perez v. Ledesma*, 401 U.S. 82, 128 n.18 (1971) (Brennan, J., concurring in part and dissenting in part) ("When Congress has wanted to protect particular categories of state business from anticipatory federal intervention, it has known how to say so."); *Calloway v. District of Columbia*, 216 F.3d 1, 9 (D.C. Cir. 2000) ("When Congress wants to use an appropriations act to limit court authority, it knows precisely how to do so.").

[59] *Cf. Dart v. United States*, 848 F.2d 217, 229 (D.C. Cir. 1988) (invoking axiom that "'Congress is presumed to be aware of an administrative or judicial interpretation of the statute…'" and observing that legislators "consulted with [the agency] at some length" and "were doubtless aware of the regulations" (quoting *Lorillard v. Pons*, 434 U.S. 575, 580 (1978))).

And the simple fact is many stations have relied on the Commission's normal processes. Some stations with outstanding construction permits had earlier relied on the standard three-year construction period and elected to defer construction expenses to sometime after February 22, 2012. Some stations with outstanding construction permits have already begun to build authorized facilities, and some had even completed construction but had not yet filed for a license to cover by February 22, 2012. For example, KPLO-TV, Reliance, South Dakota, suffered a catastrophic tower collapse in January 2010. Following more than two years of diligence and efforts to develop a plan for permanent reconstruction of the facility, a new tower site was selected and a construction permit application filed in July 2012. If granted, the new facility will have a service area that differs both from the service area that was licensed as of February 22, 2012, and the actual service area that was being covered, as authorized by Special Temporary Authority at that time.[60] A station like KPLO-TV and its viewers should in no way be limited, prejudiced, or harmed by the idiosyncratic circumstances that caused the station to be in regulatory limbo vis-à-vis the February 22, 2012, "cut off" date.

In addition, the Commission has not yet imposed a freeze on modifications like it did before conducting the post-transition DTV repacking, and, as such, some stations are continuing to file, and the Commission is continuing to accept and process, construction permit applications.[61] Stations that rely on the Commission's normal processes should not be cast aside,

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[60] *See* File No. BPCDT-20120727ACE.

[61] Only stations operating on Channel 51 have been subjected to a freeze, which was imposed (prematurely) by the Commission in 2011. *See General Freeze on the Filing and Processing of Applications for Channel 51 Effective Immediately*, Public Notice, 26 FCC Rcd 11409 (Aug. 11, 2011) ("*Channel 51 Freeze PN*"). To be clear, the Affiliates Associations do not challenge the authority of the Commission to issue a temporary freeze on certain Channel 51 (continued . . .)

nor should their financial investments be wasted, when the Spectrum Act requires no such thing. As the *Notice* states with respect to unlicensed digital Class A facilities, but which applies equally to all stations, when stations plan facilities "in reliance on the rules [of] the Commission," the failure to preserve such facilities is "fundamentally unfair to such licensees" and would "deprive the public of the important benefits" of improved over-the-air television service.[62]

With respect to protection of Class A television station facilities, members of the Affiliates Associations operate Class A stations that are primary network affiliates in their markets. Examples include WOHL-CD, Lima, Ohio, an ABC affiliate; WSVF-CA,

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(. . . continued)
applications. *See Channel 51 Freeze PN*, at 2 ("The freeze imposed herein is temporary while we consider the issues raised by the Petitioners and affects only the submission of applications for new or modified facilities."). However, the effect of the freeze, which has remained in effect since August 11, 2011, is that Channel 51 facilities have been unable to modify their operations to expand their coverage area since August 11, 2011. Without some mechanism for allowing those stations to participate in some type of "use-it-or-lose-it" opportunity, those stations will have had their protected service areas cut off much earlier than all other stations. To ensure equal treatment of all stations, *see Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965) (observing that the FCC "must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act"), the Commission should develop a solution to permit frozen Channel 51 stations to extend their protected service areas if they so desire. Without some dispensation, the Channel 51 freeze will have effectively become permanent. (To be sure, some Channel 51 stations were already operating or authorized to construct the maximum permissible facility. Those stations were not prejudiced in any way by the premature cut-off of their potential service areas.) Because the pool of Channel 51 stations unfairly affected by the disparate treatment caused by the early termination of their protected service area is relatively small—only fourteen Channel 51 stations are not already operating with maximum permissible facilities, *see Segal Engineering Statement* at 7—providing them with appropriate dispensation will not unduly impair the repacking.

[62] *Notice* at ¶ 115. Moreover, as the *Notice* itself acknowledges, the Spectrum Act does not "prohibit the Commission from granting protection to additional facilities where appropriate." *Notice* at ¶ 113.

Harrisonburg, Virginia, a CBS affiliate; KDFX-CA, Indio/Palm Springs, California, a FOX affiliate; KBFX-CD, Bakersfield, California, a FOX affiliate; and WBGH-CA, Binghamton, New York, an NBC affiliate. While it is true that the Commission's rules do not define either "coverage area" or "service area," there is nothing in the Spectrum Act that suggests that Congress intended "coverage area" to mean one thing for full power television stations and a different thing for Class A television stations. Instead, and to the contrary, the Spectrum Act clearly created two different classes of television stations, one class comprising both full power *and* Class A television stations[63] and the other class comprising low power television stations other than Class A television stations.[64] Consequently, "coverage area" must mean the same thing for full power television stations and Class A television stations.

Clearly, Class A television stations have coverage areas. Moreover, Class A status is actually dependent on that coverage area since such stations must broadcast an average of at least three hours per week of locally-produced programming each quarter[65] and "locally-produced" means produced within either the predicted analog Grade B contour or the predicted digital noise-limited contour as defined in Section 73.622(e) of the Commission's rules.[66] So while the service area of a Class A television station may not be expressly defined in the Commission's rules, it is straightforward to determine the noise-limited contour, which is precisely the area in which a Class A television station is predicted to provide coverage. To suggest, as the *Notice*

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[63] *See* Spectrum Act § 6001(6).

[64] *See* Spectrum Act § 6403(b)(5).

[65] *See* 47 C.F.R. § 73.6001.

[66] *See* 47 C.F.R. § 73.6000.

does, that only the substantially smaller protected contour of Class A television stations should be preserved[67] is to ignore both the language of the statute ("coverage area") and its intent (to hold harmless non-participating television licensees). Moreover, to confer such protection during the repacking process will not otherwise expand the rights of licensees of Class A television stations which, after the repacking, will continue to be protected only to the extent of the Commission's rules.[68]

C. The Commission Should Make Every Effort to Replicate Existing Coverage Areas After Repacking

To preserve coverage areas, the *Notice* proposes that a station assigned to a new channel can continue to use its existing antenna pattern, with an adjustment in power level so that the coverage area in total square kilometers is the same pre- and post-repacking.[69] The *Notice* also proposes to allow stations to propose alternative transmission facilities, so long as they do not extend the coverage area or cause new interference, with the result that alternative facilities will almost always result in some reduction in coverage area and/or population served.[70] Finally, the *Notice* seeks comment on whether it is consistent with the Spectrum Act to consider a station's signal to be receivable at all locations within its noise-limited contour.[71] The first two proposals

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[67] *See Notice* at ¶ 99.

[68] *See* Spectrum Act § 6403(i)(1) (stating that nothing in subsection (b) shall be construed to "expand or contract the authority of the Commission, except as otherwise expressly provided"); 47 C.F.R. §§ 73.6010-6022.

[69] *See Notice* at ¶ 100.

[70] *See Notice* at ¶ 101.

[71] *See Notice* at ¶ 102.

have some merits but also face difficulties; the final proposal is contrary to OET Bulletin 69 and, thus, to the express requirements of the Spectrum Act.

One of the principal issues of equity in dealing with stations affected by the repacking process is that, unlike the DTV transition, where everyone had to build digital facilities and deal with the issues attendant to replication of former analog facilities, in the repacking process only some stations will be affected, through no choice of their own, either by being repacked or by interference from repacked stations, while others will be completely unaffected, essentially by happenstance. Because television markets are intensely competitive, stations affected by the repacking process are at risk of losing ground to their very competitors that are at no risk in the process. And viewers lose twice: first, they may lose some existing service, and, second, they lose when competition between stations is weakened. The maxim "do no harm," which it appears Congress intended to apply to television licensees not participating in the voluntary reverse auction, ought to be the Commission's guiding principle with respect to all aspects of the repacking process, including the effects repacking could have on competitors differently situated or impacted with respect to channel reassignment.

With this guiding principle in mind, the *Notice*'s proposal to permit the continued use of existing antenna patterns has two principal benefits. *First*, by adjusting power levels, coverage areas can be preserved, and, *second*, the use of existing antenna patterns means, in most cases, that stations will be able to actually construct their new facilities, as contrasted with facilities predicated on a theoretical antenna pattern that is impracticable, or even impossible, to build. Both of these are real-world benefits. However, because propagation characteristics vary from channel to channel, the use of the same antenna pattern does not mean that the new facilities will

actually replicate coverage of the exact same area as the old facilities.[72] But that should be the goal—true *replication* of the coverage area. The statutory requirement to make "all reasonable efforts to preserve . . . *the* coverage area" (emphasis on the article "the") does not mean the Commission should only attempt to preserve *a* coverage area that is merely equivalent in size to the station's actual, existing coverage area.[73]

Thus, the main problem with the *Notice*'s proposal is that it appears not to aim high enough to make "all reasonable efforts to preserve . . . the coverage area" because it seems to assume that square kilometers are fungible.[74] But not every square kilometer is the same as every other—it depends on where it is, what its terrain characteristics are, and who lives there—and this is particularly true when a station's competitors remain completely unaffected.

To remain true to the statutory requirement, the repacking process should attempt to replicate a station's coverage area in a new DTV Table of Allotments, with no more than a 0.5% variance in the same geographic area being covered pre- and post-repacking, i.e., at least 99.5% of the square kilometers covered post-repacking should be the *same* square kilometers covered

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[72] *See Segal Engineering Statement* at 5.

[73] *See Shum v. Intel Corp.*, 629 F.3d 1360, 1367 (Fed. Cir. 2010) (reasoning that Congress's use of the definite article "the" rather than the indefinite article "a" or "an" "is evidence that what follows . . . is specific and limited") (citing cases); *Carvajal v. United States*, 521 F.3d 1242, 1248 (9th Cir. 2008) (concluding that "by preceding [a statutory term] with the definite article 'the,' Congress referenced an already defined limit to the statute's application"); *Gates & Fox Co., Inc. v. Occupational Safety & Health Rev. Comm'n*, 790 F.2d 154, 156 (D.C. Cir. 1986) (concluding that congressional use of the definite article "the" "suggest[s] that some *specific* haulage equipment is referred to, rather than merely haulage equipment in general" (emphasis added)).

[74] *See Notice* at ¶ 100 (proposing that the "coverage area in total square kilometers [be] the same as it was before the repacking, without regard to whether that area is served or unserved by the station's existing operation").

pre-repacking.[75] While this level of geographic exactitude was not required in the DTV transition, the difference is that everyone then was equally subjected to the possibility of disparities in replication, whereas here many stations will face no risk of suffering any disadvantageous changes to their coverage areas.

As the *Notice* proposes, stations should be allowed to propose alternative transmission facilities to those specified by the Commission's replication software. However, the *Notice* would confine alternative facilities to be within the coverage area specified by the replication software. This is likely to result in the alternative facilities serving fewer people and/or a smaller coverage area. The *Notice* states that it anticipates the reductions to be "*de minimis*," generally impacting less than two percent of a station's total coverage area.[76] But stations required by the repacking process to alter their facilities should not have their hands tied so tightly. Because propagation varies from channel to channel and because stations must employ antennas that can actually be built, a certain degree of flexibility in replicating existing coverage areas would ameliorate these physical constraints.

Finally, the Commission should not adopt the proposal to consider a station's signal to be receivable at all locations within its noise-limited contour, thereby ignoring terrain losses.[77] The Spectrum Act requires the Commission to use "all reasonable efforts to preserve . . . the coverage area" of stations "as determined using the methodology described in OET Bulletin 69."[78] OET

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[75] Differences of less than 0.5% are equivalent to zero when rounded to an integer value.

[76] *See Notice* at ¶ 101.

[77] *See Notice* at ¶ 102.

[78] Spectrum Act § 6403(b)(2).

Bulletin 69 implements the Longley-Rice methodology for evaluating coverage area and interference. The principal distinguishing feature of the Longley-Rice computer model is that it predicts signal strength at specified geographic points based on the elevation profile of the terrain between the transmitter and each reception point.[79] In other words, the effect of terrain on signal reception is the *sine qua non* of the model. Congress is well aware of the nature of the Longley-Rice model, having specified its use in other statutes concerned with accurately determining where television signals are and are not receivable.[80] To ignore terrain losses and assume a station's signal is receivable at all locations within its noise-limited contour is to eviscerate the statutory requirement to preserve coverage areas using OET Bulletin 69.[81] Far from being "consistent with Congress's intent that we make 'all reasonable efforts' to preserve stations' coverage areas," as the *Notice* suggests,[82] such an approach turns the statutory requirement on its head and is directly contrary to law. Were the Commission to adopt this approach, it would clearly be reversible on appeal,[83] thereby delaying unnecessarily the auctions

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[79] *See* OET Bulletin 69 at 1; *see generally Segal Engineering Statement* at 3-4 (explaining the OET Bulletin 69 methodology).

[80] *See, e.g.*, 17 U.S.C. § 119(a)(2)(B)(ii)(I); 47 U.S.C. § 339(c)(3)(A).

[81] *See Segal Engineering Statement* at 3 (observing that the OET Bulletin 69 "calculation procedure for determining service takes terrain factors into account" (emphasis in original)).

[82] *Notice* at ¶ 102.

[83] *See Chevron U.S.A., Inc. v. Nat'l Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9, 844 (1984) ("[t]he judiciary . . . must reject administrative constructions which are contrary to clear congressional intent"; accordingly, "legislative regulations are given controlling weight" only when they are not "manifestly contrary to the statute" (citations omitted)); *cf. Ragsdale v. Wolverine World Wide, Inc.*, 535 U.S. 81, 91 (2002) ("'Regardless of how serious the problem an administrative agency seeks to address . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" (quoting *Brown*

(continued . . .)

and repacking process.

Because the Commission cannot ignore terrain losses in calculating coverage areas, it should seek to replicate existing coverage areas as closely as possible, with no more than a 0.5% difference in the same geographic area being served, and it should allow flexibility in specifying alternative facilities that increase a station's coverage area.[84] The Commission must also recognize that it may only repurpose as much television spectrum as the congressionally authorized process makes available, including through satisfaction of the statutory requirements set forth in Section 6403(b)(2) of the Spectrum Act. This is a core public policy determination that inheres in the Spectrum Act's structure. The Commission will not have used "all reasonable efforts" to preserve coverage areas if it simply tries to cram stations into insufficient spectrum when the obvious alternative is to preserve enough spectrum for television that meets the statutory requirements. Congress did not give the Commission unbridled authority to reassign television channels and to reallocate spectrum but, instead, expressly conditioned its authority to act by requiring, *inter alia*, that it preserve coverage areas as determined by using the methodology set forth in OET Bulletin 69, which means that it must take account of terrain losses in calculating coverage areas.

(. . . continued)
& Williamson Tobacco Corp., 529 U.S. 120, 125 (2000))).

[84] *See Notice* at ¶ 102 (seeking comment on how to treat coverage areas if the Commission does not adopt the approach of ignoring terrain losses in determining coverage areas).

D. A Rule That Preserves Service to the Same Viewers and Only Allows "Replacement" Interference That Existed As of the Enactment Best Comports with the Spectrum Act

To satisfy the statutory requirement to preserve the population served for stations affected by the repacking process, the *Notice* proposes three alternatives: (1) Under the first alternative, new interference would be permitted anywhere in the station's coverage area, provided that the total interference-free population served by the station would not be reduced by more than 0.5%, but the actual viewers within the interference-free service area are not necessarily the same viewers served pre-repacking[85]; (2) under the second alternative, service to the same specific viewers would be preserved, no individual channel reassignment could reduce the number of those viewers by more than 0.5%, and the "replacement" interference, calculated on a station-by-station basis, must have existed as of February 22, 2012[86]; and (3) under the third alternative, service to the same specific viewers would be preserved, "replacement" interference, calculated on a station-by-station basis, would be permitted only from a station already causing that interference, but new interference, up to 2%, would be permitted between stations that did not interfere with each other as of February 22, 2012.[87]

The second alternative best comports with the statutory requirement. As in the case of coverage area, the Commission should seek to hold harmless those broadcasters not participating in the reverse auction, and that includes consideration of the effects the repacking process will have on some stations but not their competitors. The second alternative achieves that goal better

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[85] *See Notice* at ¶¶ 103-05.

[86] *See Notice* at ¶ 106.

[87] *See Notice* at ¶¶ 107-08.

than the other two alternatives for several reasons.

The Spectrum Act requires "all reasonable efforts" to preserve "*the* coverage area and population served" of the affected television stations. The use of the definite article "the," which modifies both "coverage area" and "population served,"[88] indicates that Congress intended that all reasonable efforts be made to preserve coverage for the same specific viewers, especially in the context of the overarching intent to hold harmless non-participating broadcasters. Neither the first nor the third alternative comports with this statutory directive. The first alternative fails because it does not seek to preserve service to the same specific viewers at all, and the third alternative also fails because it permits as much as 2% new interference to existing viewers, which is well beyond the "rounding to zero" rationale used to support the amount of interference permitted under either of the other two alternatives.[89]

If service to the same specific viewers is not preserved, then some stations could be put at risk of being competitively disadvantaged and certain specific viewers would be disenfranchised. This is illustrated in Figure 1.

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[88] *See* Bryan A. Garner, *A Dictionary of Modern Legal Usage* 77 (2d ed. 1995) ("When two or more nouns are connected by a conjunction, it is usually best to repeat the article before each noun. When the article is not repeated, the sense conveyed is that the nouns are identical or synonymous.").

[89] *Cf. Notice* at ¶ 103 (stating that the Commission treats "0.5 percent as 'no new interference' because 0.5 percent is equivalent to zero when rounded to an integer value").

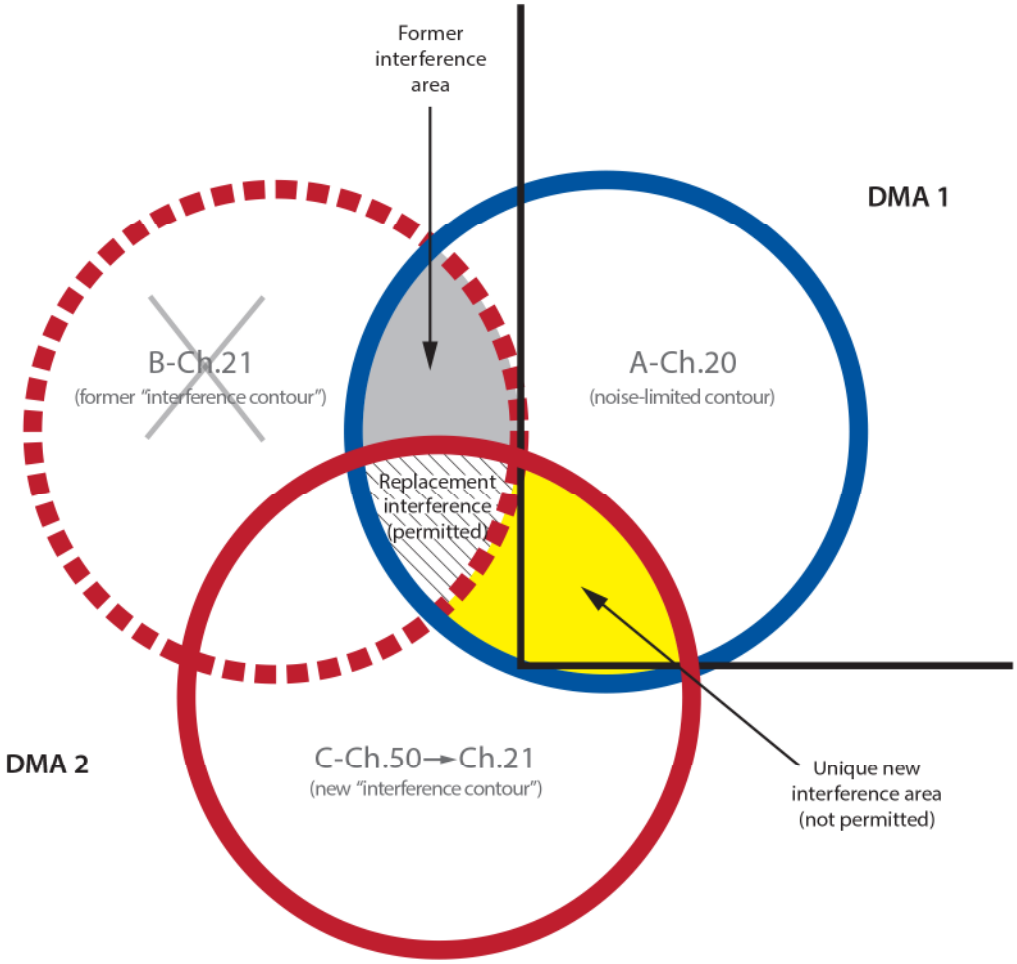

Figure 1

Figure 1 (based upon Figure 3 of the *Notice*) locates Station A in DMA 1. The former interference area caused by Station B in DMA 2 was located in DMA 2. If Station C were permitted to cause new interference in a different geographical area than Station B previously caused (the yellow area), as permitted by the *Notice*'s first alternative, rather than just the same geographical area (the hash-marked area), as proposed in the *Notice*'s second alternative, then Station A could suffer new service losses in its own DMA. This could harm Station A and place it at a competitive disadvantage by cutting off access to in-DMA viewers that may be critical to

Station A's economic viability. Assume Station D (not shown in Figure 1) is co-located with Station A, broadcasts on Channel 14, and is not affected by the repacking process. Station D will accordingly reach those viewers within its DMA that interference masks for Station A. If any of those households is a Nielsen home, then Station A's opportunities for ratings are negatively affected vis-à-vis Station D's. At the same time, this new interference harms the public by depriving viewers of access to Station A's television service that they previously received.

The *Notice* appears to concede these faults in the first alternative but attempts to explain them away. For example, the *Notice* notes that viewers of a station affiliated with a major network who are located at the fringes of the station's coverage area often have access to the same programming from other stations.[90] But that observation ignores the importance of localism, the bedrock of the nation's broadcasting system.[91] While a viewer located in such an area may have access to the same network programming from a station affiliated with the same network in an adjacent market, the interference will prevent that viewer from receiving his or her local station's news, weather, public affairs, and emergency programming, in all of which the

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[90] *See Notice* at ¶ 105 n.165.

[91] *See Broadcast Localism*, Notice of Inquiry, 19 FCC Rcd 12425 (2004), ¶¶ 1, 4 ("[L]ocalism has been a cornerstone of broadcast regulation for decades. Broadcasters, who are temporary trustees of the public's airwaves, must use the medium to serve the public interest, and the Commission has consistently interpreted this to mean that licensees must air programming that is responsive to the interests and needs of their communities of license."); *see also, e.g.*, Intellectual Property and Communications Omnibus Reform Act of 1999, H. R. REP. NO. 106-464, 106th Cong., 1st Sess. 92 (Nov. 9, 1999) (Conf. Report) ("It is well recognized that television broadcast stations provide valuable programming tailored to local needs, such as news, weather, special announcements and information related to local activities."); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968) (declaring local broadcasting to be "demonstrably a principal source of information and entertainment for a great part of the Nation's population").

local station would have made substantial investments. The fact is, stations tailor their programming to the viewers they reach. Cutting off viewers and stations from each other results in a loss of tailored service that is contrary to the public interest.

The *Notice* also suggests that the economic effect on a station receiving new interference is not likely to be high, because the changes in viewership are unlikely to occur near the center of the station's coverage area where population density is highest.[92] Figure 1 above belies that suggestion. There are numerous areas throughout the country where major markets abut each other and where population density remains high even on the fringes of a particular station's coverage area: the Northeast corridor (from Boston to Washington, D.C.), south Florida, Chicago and Milwaukee, Los Angeles and San Diego, and San Francisco and Sacramento, to name a few. Unsurprisingly, these are precisely the areas where new wireless spectrum is likely to be in high demand and where broadcasters not participating in the reverse auction are most likely to be negatively affected by the repacking process.

Not only is the second alternative truer to the language and intent of the Spectrum Act, but it is computationally simpler than the first alternative as well. The second alternative requires only examination of interference between channel pairs, whereas the first alternative requires examination of interference for all channel assignments. Given the enormous complexities of the entire enterprise, the Commission should not adopt a more complicated approach when a simpler one is already at hand that better comports with the statutory requirements.

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[92] *See Notice* at ¶ 105 n.165.

Because the second alternative calculates interference on a station-to-station basis only,[93] it is also necessary to impose an aggregate cap on such replacement interference. In congested areas, stations could see their population served chipped away by a number of other stations if an aggregate cap is not also imposed.[94] The Affiliates Associations agree with the recommendation of the National Association of Broadcasters ("NAB") that the Commission adopt a 1% aggregate cap on replacement interference.[95] The imposition of such an aggregate cap will best comply with the Spectrum Act's requirement that the Commission use "all reasonable efforts" to preserve the population served of affected stations.

Finally, the Commission should not adopt a separate standard for new interference in portions of a station's coverage area that are located outside such station's DMA.[96] The Spectrum Act draws no distinction between the coverage area or population served that is within a station's DMA vis-à-vis that served outside of a station's DMA. "*The* coverage area and population served" means just that. In addition, every year some counties are reassigned by Nielsen Media Research from one DMA to another based on overall viewing habits. If the

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[93] *See Notice* at ¶ 106.

[94] Moreover, as illustrated in the *Segal Engineering Statement*, the interference comparison between a station's "old" and "new" channels may be erroneous if the interference cells for the old channel are not precisely indexed against the interference cells for the new channel. *See Segal Engineering Statement* at 6. This is an important consideration because the interfering stations for the new channel will necessarily be different from those for the old channel. Thus, the Commission must develop a procedure to ensure that the interference cells indexed for the two channels are compared as apples-to-apples and not as apples-to-oranges. *See Segal Engineering Statement* at 6.

[95] *See* Comments of NAB at Section III.C.

[96] *See Notice* at ¶ 110.

Commission were to allow, contrary to the statute, greater interference in a county in a particular station's coverage area that is currently outside that station's DMA, and that county were subsequently assigned to such station's DMA,[97] then those broadcast stations not affected by repacking that are located in the same DMA as the reassigned station will potentially be reaching now in-DMA Nielsen households whereas the reassigned station will not because of the additional interference that had been permitted. Because station allocations are far more permanent than DMA boundaries, the Commission should not adopt bifurcated interference standards that have the potential to competitively disadvantage only those stations (involuntarily) affected by the repacking process.

E. Service Provided by Replacement Digital Television Translators Should Be Considered to Be Included Within the Population Served by the Associated Full-Power Station and, Thus, Protected in the Repacking

Following the 2009 DTV transition, the Commission created a new class of television stations—"replacement digital television translators."[98] While akin to low power stations and television translator stations in so far as they operate with low power and have been licensed on a secondary frequency use basis, replacement translators have a unique status because the

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[97] In the period immediately after the repacking process is completed, it should be expected that greater numbers of counties than typical will be reassigned because some broadcast stations will have exited the business and others could have materially different coverage areas (in particular, those stations voluntarily moving from UHF to VHF channels), both of which will likely have an effect on aggregate viewing patterns, which is the basis upon which Nielsen assigns a county to a particular DMA.

[98] *See Amendment of Parts 73 and 74 of the Commission's Rules to Establish Rules for Replacement Digital Low Power Television Translator Stations*, Report and Order, 24 FCC Rcd 5931 (2009) ("*Replacement Digital Translator Order*").

Commission created them specifically to permit full-power television stations to continue to provide service to viewers who had lost service as a result of the DTV transition. Unlike other translator stations, replacement translators are intended to restore service within a full-power station's coverage area, and, therefore, they are associated with the full-power station's main license, share the same call sign and facility identification number as the main station, may not be separately assigned or transferred, and are renewed along with the full-power station's main license.

Due to unavoidable engineering changes that stations were required to implement during the DTV transition, stations, in some cases, were no longer able to serve portions of the population previously served by their analog operations. Recognizing the need to replace service to these loss areas, and in furtherance of the Commission's goal that "all Americans continue to receive the television broadcast service that they are accustomed to receiving to the greatest extent feasible,"[99] the Commission established the new replacement digital translator service.

Many broadcasters have applied for and operate replacement digital translators, and viewers have come to rely on these translators for continued service. In fact, such reliance is likely even unknown to the viewers in the digital world: As a result of the Program and System Information Protocol (PSIP), most viewers living in the full-power station's service area are not even aware that they are watching a replacement digital translator because the translator shares the associated full-power station's virtual PSIP channel number (and call sign). The elimination or impairment of the service that replacement digital translators provide would cause a serious disruption to these viewers. These viewers narrowly escaped service disruption in the 2009 DTV

[99] *Replacement Digital Translator Order* at ¶ 4.

transition and should not be faced with that same risk again only a few years later.

Because the unique purpose of replacement digital translators is to restore service losses as a result of the DTV transition, the service provided by these stations warrants special consideration in this proceeding. Accordingly, the Affiliates Associations urge the Commission to protect the population served by replacement digital translators in the repacking. Nothing in the Spectrum Act prohibits the Commission from protecting the population served by these translators. Indeed, as the Commission has recognized, the Commission has the authority to protect additional facilities "where appropriate."[100] Thus, the population served by replacement digital translators should be considered to be included within the population served by the associated full-power stations, which the Spectrum Act requires the Commission to make all reasonable efforts to preserve and carry over in the repacking. Accordingly, to the extent the channel of a station that relies on replacement digital translators is not being moved in the repacking, it is necessary for the Commission to protect those replacement digital translators themselves. And, further, if the channel of a station that relies on replacement digital translators is changing, then the coverage area of and population served by those replacement translators should be protected, although such station may or may not require replacement translators after the relocation, depending on the characteristics of its new allotment.

Furthermore, the spectrum repacking will necessarily involve unavoidable engineering changes that are essentially identical to the DTV transition changes that created the need for replacement digital translators in the first place. Therefore, full-power stations should continue to be able to apply for new replacement digital translators after the repacking to restore service to

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[100] *See Notice* at ¶ 113.

any resulting loss areas. In this regard, the Affiliates Associations suggest that the permissible service area of replacement translators be extended to digital loss areas (due to the repacking) in addition to analog loss areas.[101] Moreover, new replacement translator applications warrant special consideration due to their unique purpose of preserving full-power population service and the Spectrum Act's mandate to protect that service and, therefore, should have processing priority over any other low-power and translator applications.

F. More Time Is Warranted for Advance Notice for Relocation of Secondary Fixed BAS Stations

A new band plan and the repacking of television stations will necessarily affect secondary fixed BAS stations operating in the UHF band. Although a secondary service, fixed BAS licenses are critical to certain station operations.[102]

The Affiliates Associations agree that broadcast television or new licensees should be required to provide advance notice to all incumbent fixed BAS operations within interference range prior to commencing operations in the vicinity. However, the Affiliates Associations believe that more time is necessary than the 30 days advance notice proposed in the *Notice*.[103] Generally, the process for a secondary fixed BAS licensee to change its operations will take at least 90 days and possibly more, depending on processing time of license applications by the

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[101] *See* 47 C.F.R. § 74.787(a)(5)(i).

[102] The Affiliates Associations agree that, to the extent it is operationally possible, secondary fixed BAS stations should continue to be licensed in the UHF band. *See Notice* at ¶ 217. The Affiliates Associations are not aware of any interference issues that have been caused by these operations, and such secondary BAS licensees know that their operations may be displaced at any time by a station with primacy.

[103] *See Notice* at ¶ 219.

Wireless Telecommunications Bureau.[104] While it would be possible, in some cases, to commence operation of the new facility immediately following the filing of the application,[105] the Commission's rules do not permit such "temporary conditional" operations in every instance. But even where a licensee's facility would qualify for temporary conditional operation upon the filing of the license application, such "early" operations would only be possible *after* the mandatory 30-day frequency coordination process. Thus, even in those instances, the entire 30-day notice period proposed in the *Notice* would have been eclipsed before the new studio transmitter link (or other BAS link) could commence operations.

The importance of these fixed BAS links cannot be overstated. In many instances, these facilities are not used or maintained merely as redundant or backup facilities; instead, they serve as studio transmitter links—i.e., the critical link between a station's studio and the station's tower site. In such instances, required termination of the BAS facility would result, literally, in a television station's cessation of broadcasting. Such a result would be contrary to the public interest, especially because the alternative—a slightly longer advance notice period of at least 90 days—would be reasonable, easy to implement, and create no countervailing negative consequence.

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[104] Once a secondary fixed BAS licensee learns that its facilities will be displaced, the licensee must take each of the following steps before it can commence operations in a new band: (1) determine an available band; (2) select and procure new transmit (and possibly receive) equipment; (3) conduct the required Prior Coordination Notification process—which, itself, takes 30 days pursuant to Commission Rule Section 101.103(b), *see* 47 C.F.R. § 74.638 (requiring fixed BAS licensees to use the frequency coordination procedures set forth in Section 101.103); (4) following successful completion of frequency coordination, draft and file a new license, or license modification, application with the Wireless Telecommunications Bureau; (5) install the new equipment; and (6) obtain grant of the application.

[105] *See* 47 C.F.R. § 74.25.

III. The Commission Should Adopt a Band Plan That Features Separate, Contiguous Spectrum for Broadcasting and Wireless, Rather Than a Split Band Plan, and the Wireless Blocks Should Be Configured on a Nationwide, Rather Than Geographically Variable, Basis

Critical to the ultimate success of the forward and reverse auctions and subsequent repacking of television broadcast spectrum is the way in which the 600 MHz spectrum is reconfigured in a new band plan. The *Notice* proposes as its preferred approach a split band plan in which wireless uplink blocks are configured from Channel 51 downwards and wireless downlink blocks are configured from Channel 36 downwards, with Channel 37 remaining unchanged for radio astronomy and wireless medical telemetry. An "island" of television broadcast spectrum would exist above Channel 37, and these television channels would be separated from the 600 MHz uplink blocks by a guard band. Television broadcast spectrum would also remain below the 600 MHz downlink blocks, again buffered by a guard band.[106] The *Notice* also proposes that the extent of the wireless blocks could be variable across different geographical areas, rather than nationwide in scope.[107] These proposals add unnecessary, and, ultimately, self-defeating complexity to an already difficult task.

The Affiliates Associations instead endorse the band plan being advanced by NAB.[108] Under that plan, which is largely consistent with an alternative proposal presented in the *Notice* (termed "Down from Channel 51"),[109] the 600 MHz uplink blocks are configured starting at

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[106] *See Notice* at ¶ 126 & Figure 4.

[107] *See Notice* at ¶¶ 136-43.

[108] *See* Comments of NAB at Section IV.B.4.

[109] *See Notice* at ¶ 178 & Figure 12.

Channel 51 downwards, followed by a duplex gap, and then followed by the 600 MHz downlink blocks. This contiguous wireless spectrum is then buffered by a single guard band from the new core television spectrum, which is interrupted only by existing Channel 37. This band plan structure is also supported by AT&T, Intel, Qualcomm, T-Mobile, and Verizon Wireless.[110] The Affiliates Associations also agree with NAB that the wireless blocks should be configured on a nationwide basis, rather than on a geographically variable basis.

The *Notice*'s lead proposals have a number of serious flaws. NAB's plan does not suffer from these disadvantages, is more spectrally efficient, and is substantially better at reducing, if not eliminating altogether, interference concerns.

A split band plan harms both broadcast television service and wireless service. Television service suffers because existing digital television receivers are not designed to reject unwanted wireless signals on frequencies both above and below television channels. Consumers will be frustrated when their hundreds of millions of existing receivers experience impaired reception. While new receivers can be designed with the necessary filters, these add to the complexity and cost of receivers, costs that are ultimately borne by consumers.

The potential for interference from out-of-band emissions is also increased under a split band plan because wireless devices will necessarily be operating closer in frequency to television channels as a consequence of the "island" of television spectrum stranded in the middle of wireless blocks.[111]

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[110] *See* Letter to Gary Epstein and Ruth Milkman, FCC, from AT&T, Inc., Intel Corporation, National Association of Broadcasters, Qualcomm, T-Mobile, and Verizon Wireless, GN Docket No. 12-268 (Jan. 24, 2013).

[111] *See* Comments of NAB at Section IV.A.

Wireless service will also suffer from a split band plan. Intermodulation interference from television stations operating in the "island" will fall in the wireless blocks. The large duplex gap that is a necessary part of the split band plan also will add unnecessary complexity and costs to develop a wireless handset antenna that will work well for both reception and transmission, costs that will, again, be borne by consumers.

A geographically variable band plan also presents significant difficulties for both broadcast television and wireless services. Interference concerns from both industries will be principally addressed through appropriately-sized guard bands. That works well if the guard bands occupy the same frequencies nationwide, but they won't protect television viewers or wireless consumers if the size of the wireless blocks differ in different geographical areas. Adjacent geographical areas could have these two different services operating on the same or adjacent frequencies under a variable band plan. This is a recipe for co-channel and adjacent channel interference. In the "television" area, stations will be subject to interference from wireless operations. In the "wireless" area, high power television transmitters from the adjacent geographic area will mask reception at cell tower sites of the low level signals from wireless devices. While sufficiently large protection zones could ameliorate these interference concerns, the separation distances are so great (NAB estimates the necessary separation distances to range from 225 km to 375 km[112]) that the spectral efficiency of the variable plan is seriously compromised.

In contrast, NAB's nationwide version of the *Notice*'s "Down from Channel 51" alternative avoids these severe disadvantages. Interference issues can be addressed by providing

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[112] *See* Comments of NAB at Section IV.B.3.

for one appropriately-sized nationwide guard band. Such guard bands have been used by the Commission between virtually every service band. NAB's proposal is far simpler to implement. It is also more efficient because it requires just one guard band instead of two. Complexities and costs in digital television receiver and wireless handset antenna design are minimized. In addition, an appropriately-sized duplex gap also allows space for unlicensed devices and wireless microphones.

For these reasons, as well as those expressed by NAB in its comments, the Affiliates Associations urge the Commission to adopt the "Down from Channel 51" band plan with a single guard band occupying the same frequencies nationwide.

IV. The Commission Should Adopt a Reimbursement Procedure That Is Equitable and Makes Whole All Remaining Broadcasters

A. The TV Broadcaster Relocation Fund Is Intended to Cover All of the Reasonable Costs Incurred by Remaining Broadcasters As a Result of the Repacking

The Spectrum Act requires that broadcast stations reassigned as the result of the repacking be reimbursed for their reasonably incurred costs.[113] The Spectrum Act further requires that $1.75 billion of the proceeds from the forward auction be deposited in the TV Broadcaster Relocation Fund ("Fund") for payment of those relocation costs, as well as certain relocation costs incurred by MVPDs.[114] Because Congress intended that remaining broadcasters not be harmed by the auction and repacking processes and because Congress set aside a fixed

[113] *See* Spectrum Act § 6403(b)(4)(A).

[114] *See* Spectrum Act § 6402 (amending 47 U.S.C. § 309(j)(8)(G)(iii)(I)); *id.* § 6403(d)(2).

amount that it believed would be sufficient to cover all reasonable costs incurred by those remaining broadcasters, the $1.75 billion Fund effectively serves as a "budget" for repacking. That budget number must be figured into the Commission's repacking model.

At the Commission's TV Broadcaster Relocation Fund Workshop, held June 25, 2012, a Harris Corporation executive estimated that certain "hard" costs for relocation would range from $1,125,000 to $2,258,000 per station, excluding costs for tower modifications, building modifications, and "soft" costs.[115] NAB has further estimated that it could cost as much as $4,000,000 or more for a major change facility in a medium-sized market.[116] The Affiliates Associations compiled data from member stations of their actual costs during the DTV transition (attached as Appendix A hereto), and those data show that the costs likely to be incurred as a result of repacking will be at the top end of the Harris and NAB estimates. Consequently, the Commission will need to factor these costs into its repacking model to determine how many stations it can realistically relocate within its relocation "budget." These industry estimates suggest that the Commission should not plan on relocating more than 400 to 500 stations because otherwise relocation costs will exceed the amount of the Fund Congress established to fully reimburse broadcasters. Indeed, because the Fund must also reimburse certain MVPD costs and, as argued below, should also reimburse certain costs incurred even by those broadcasters that are not being relocated but are nevertheless affected by the repacking process, the number of stations that can be moved within the "budget" may be even lower.

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[115] *See* Jay Adrick, *Broadcaster Relocation Fund Workshop Expanded Presentation* (June 25, 2012), Slides 15-17, *available at* <http://transition.fcc.gov/presentations/06252012/jay-adrick.pptx>.

[116] *See* Comments of NAB at Section V.A.

B. The Commission Must Give Stations Sufficient Time to Build and Obtain Reimbursement

Clearly, a significant number of the members of the Affiliates Associations, as well as other stations, are expected to be involuntarily repacked following the spectrum auction and will, as a result, incur significant expenses. Unlike the DTV transition, when stations had more than a decade to carefully plan and voluntarily choose their new channels, the post-auction repacking is expected to occur in a much shorter time period and may provide little choice in new allotments. Under these circumstances, the Commission must focus on "making whole" those stations that choose to continue to serve the public interest by broadcasting and treat such broadcasters equitably.

To that end, the Commission should take all possible steps to ensure that involuntarily repacked stations have the maximum possible amount of time to construct their new facilities and still qualify for reimbursement from the Fund. Thus, the Affiliates Associations propose that the Commission deem the forward auction complete only when final licenses are granted to winning bidders in the forward auction, which should not be until or after the time at which television stations that are subject to being repacked actually file applications for construction permits to change channels.[117]

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[117] Since Congress is presumed to know that the Commission's standard term for a construction permit is three years, *see* 47 C.F.R § 73.3598 (2012); *1998 Biennial Regulatory Review—Streamlining of Mass Media Applications, Rules, and Processes*, Report and Order, 63 Fed. Reg. 70040, 70044 (Dec. 18, 1998) (extending the construction period for broadcast stations to three years), it is evident that the structure of the reimbursement scheme was intended to function in harmony with the typical construction period and that the Spectrum Act did not intend to shortchange broadcasters on either the period available for construction or the opportunity for reimbursement.

Given the nature and extent of any repacking, there will undoubtedly be—as there were during the DTV transition—stations that experience uncontrollable delays due to local zoning, international coordination, litigation, and force majeure events. Appropriate dispensation must be made for such stations so that they too may timely construct their new facilities and receive reimbursement from the Fund. Because the Spectrum Act limits reimbursements to a three-year period following the completion of the forward auction, these issues are of significant concern and should be considered carefully in this proceeding so as to preserve the viability of local broadcast service.

The Affiliates Associations urge the Commission, as does NAB,[118] to delegate administration and oversight of the Fund to an outside third party, much in the same way that it has done for oversight of the Universal Service Fund[119] and for the administration of the 800 MHz band transition.[120] The fees for such a third-party administrator should not come from Fund monies but instead should be taxed against the Commission's own administrative costs.[121] If the third-party administrator is an independent entity with no ties to entities that might be eligible for reimbursement from the Fund, it should help to guard against waste, fraud, and abuse.[122]

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[118] *See* Comments of NAB at Section V.E.

[119] *See Notice* at ¶ 354.

[120] *See Improving Public Safety Communications in the 800 MHz Band*, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969 (2004), ¶ 191.

[121] *See* Spectrum Act § 6403(c)(2)(C); 47 U.S.C. § 309(j)(8)(B).

[122] *See Notice* at ¶¶ 353-54 (seeking comment on how to prevent waste, fraud, and abuse of the Fund).

C. The Scope of Eligible Expenses Subject to Reimbursement Must Be Interpreted to Make Remaining Broadcasters Whole

At the outset, the Affiliates Associations reject any suggestion that it would be appropriate to apply a "minimum necessary costs standard"[123] to the Spectrum Act's reimbursement mandate. The *Notice* references that standard—which was applied in the reallocation of the 800 MHz band—as having the potential here to limit repacking reimbursement to costs that are "reasonable, prudent and the minimum necessary to provide facilities and services comparable to those presently in use."[124] But the reimbursement standard expressly set forth in the Spectrum Act is one of "costs *reasonably* incurred,"[125] which, on its face, is less restrictive and more flexible than "reasonably prudent and the minimum necessary." While the two standards both incorporate a touchstone of "reasonableness," the similarity ends there. The Spectrum Act does not incorporate the limiting constraints of "prudent and the minimum necessary," and it would be inappropriate for the Commission to read such non-existent limitations into the clear language of the statute.[126] To be clear, the Affiliates Associations do not favor a reimbursement process that rewards excessive or unwarranted expenditures—which would be, by their very nature, unreasonable—but the standard set forth in the Act already appropriately constrains reimbursement to a standard of "reasonableness," which

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[123] *Notice* at ¶ 343.

[124] *Notice* at ¶ 343.

[125] Spectrum Act § 6403(b)(4)(A) (emphasis added).

[126] *See, e.g., Roberts v. Sea-Land Servs., Inc.*, 132 S. Ct. 1350, 1356 (2012) (observing that statutory construction must "look first to [a statute's] language, giving the words used their ordinary meaning").

is one regularly and routinely applied by the law in a wide variety of contexts.[127]

The ambitious time frame for the spectrum clearing and repacking process is likely to cause the fair market value of certain critical products and services to be higher than they otherwise would be, absent the compressed time horizon. The greater demand that exists for a product or service will drive up the price of that good or service, and that is particularly true when a good or service is scarce. For example, as was evident during the DTV transition, the ability of stations to schedule repacking construction will depend on the availability of tower crews—the fewer tower crews available, the higher the fair market value of their services will be. According to a presentation made at the Commission's June 2012 Relocation Fund Workshop, only "14 tower crews in the US . . . have the skills, training, equipment and insurability to remove and replace heavy television transmitting antennas on tall towers."[128] It is easy to imagine, then, that the skills of these few tower crews will be in high demand over an unusually short period of time.[129] The result may be that the costs of their services are higher than what they would be in the normal course, but that circumstance, by itself, cannot render such higher costs unreasonable or ineligible for reimbursement.[130] So long as products and

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[127] *See, e.g.*, BLACK'S LAW DICTIONARY 1379 (9th ed. 2009) (defining "reasonable" as "[f]air, proper, or moderate under the circumstances").

[128] Jay Adrick, *Broadcaster Relocation Fund Workshop Expanded Presentation* (June 25, 2012), Slide 6, *available at* <http://transition.fcc.gov/presentations/06252012/jay-adrick.pptx>.

[129] In certain regions, winter weather and summer hurricane season significantly limit the periods of time in which stations may reasonably be expected to construct their repacked stations.

[130] Clearly, stations will wish to hire appropriately skilled and experienced tower crews for tall tower work as they make every effort to avoid calamitous situations such as the collapse of the 2,000 foot tower of KATV and KETS in Arkansas during DTV transition modifications.
(continued . . .)

services are fairly bargained for, the expenses associated therewith should be *prima facie* reasonable and, therefore, reimbursable.

In addition, the Affiliates Associations urge the Commission to recognize the full extent of its discretion to reimburse eligible expenses. While it is true that the Act *mandates* reimbursement "only [of] full power and Class A television licensees that are involuntarily assigned to new channels in the repacking process,"[131] the Spectrum Act does not *prohibit* reimbursement of repacking expenses incurred by other television stations. In fact, the *only* prohibitions on reimbursement are (i) expenses that fall outside of the "reasonably incurred" standard, and (ii) "lost revenues."[132] It is important to understand, then, that the mandate portion of the Act is only a reimbursement floor, and the Commission retains discretion to use the Fund to satisfy the reimbursement needs of other television stations that are directly or indirectly affected by the repacking. There is no question that there will be stations whose channel assignments do not change but that will nevertheless incur real-world expenses that should be reimbursed by Fund monies.

Two examples illustrate this point. Four full-power Boston-area television stations share transmission facilities at their common tower site in Needham, Massachusetts. The stations operate on RF channels 20, 30, 39, and 43. Some, but not all, of those stations are likely to be

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(. . . continued)
See Nate Hinkel, *UPDATED: KATV Tower Collapses, Competitors, Comcast Try to Help* (Jan. 11, 2008), *available at* <http://www.arkansasbusiness.com/article/43722/updated-katv-tower-collapses-competitors-comcast-try-to-help>. Flexible construction deadlines and reimbursement combined with skilled, experienced tower crews provide the highest likelihood of avoiding a recurrence.

[131] *Notice* at ¶ 337.

[132] Spectrum Act § 6403(b)(4)(C) (providing that the Commission "may not make reimbursements . . . for lost revenues").

assigned new channels; however, all of the stations are likely to incur expenses because of the nature of the shared physical plant. The channel 20 station's expenses are no less worthy than the channel 43's expenses to move to a new channel even if the channel 20 station is not involuntarily moved to another channel; the channel 20 station's expenses are still incurred involuntarily and should qualify for reimbursement. Similarly, in the Commission's own backyard, five full-power television stations—WJLA-TV (channel 7), WUSA (channel 9), WHUT-TV (channel 33), WETA-TV (channel 27), and WPXW-TV (channel 34)—share the same antenna along with three FM radio stations and several non-broadcast facilities. The Commission has encouraged precisely this type of efficient co-location, and the non-repacked stations should not be penalized—i.e., go unreimbursed—for costs associated with accommodating changes to the facilities shared with repacked stations. Thus, if any of the stations is involuntarily repacked to a new channel, the other four television stations are likely to involuntarily incur costs because of the nature of the shared physical plant. These expenses merit reimbursement from the Fund, and nothing in the Spectrum Act would prohibit the Commission from reimbursing them, thereby ensuring that the repacking process does no harm to television broadcasters that are involuntarily affected by the spectrum auction and subsequent repacking.[133]

In its comments, NAB is submitting a list of categories of broadcaster spectrum repacking expenses.[134] The Affiliates Associations agree that all the expenses listed therein

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[133] In both examples—and there are other similar examples across the country in large and small markets alike—stations on these towers are members of the Affiliates Associations.

[134] *See* Comments of NAB at Section V.D & Appendix A.

should qualify as eligible for reimbursement but, in keeping with the Spectrum Act, only so long as they are "costs reasonably incurred" in the repacking process. Although the Affiliates Associations do not, at this time, have other reimbursement expense categories to add to the list compiled by NAB, the Affiliates Associations posit that no list can truly be exhaustive in its scope. Thus, the Affiliates Associations caution that NAB's list merely represents expenses that are likely to be commonly incurred in the vast majority of cases and recognize that idiosyncratic conditions and situations will invariably lead to other expenses that warrant and qualify for reimbursement, even if they are not foreseeable and predictable at this time.

In addition, as noted previously,[135] the Affiliates Associations are submitting a list of various equipment, services, and associated expenses related to the DTV transition that the Affiliates Associations urge the Commission to consider reasonable and illustrative.[136]

V. The Impact of Repacking on Low Power Television Stations and Television Translator Stations May Be Severe

The *Notice* seeks comment on the impact of the spectrum incentive auction on low power television and television translator stations (collectively, "LPTV stations").

The *Notice* proposes that full power and Class A stations will be assigned new channels in the repacking process without regard to whether such assignments, or the modified facilities required to implement service on them, would interfere with existing low power television and

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[135] *See* Section IV.A, *supra*, and Appendix A hereto.

[136] The data in Appendix A is based both on actual expenses incurred by television stations during the DTV transition and on a schedule of expenses deemed reimbursable by NTIA as part of its noncommercial digital television grant program. Because these data are based on real world figures and on figures previously deemed reasonable and reimbursable by a government agency, they represent, *prima facie*, reasonable expenses.

translator facilities.[137] Specifically, the *Notice* states that "[w]here such interference exists, or where an existing low power television or translator station would cause interference to a repacked 'primary' status station, the low power television or translator station will be 'displaced' and will either have to relocate to a new channel that does not cause interference or else discontinue operations altogether."[138] Because the repacking process, by definition, entails allocating more full power and Class A stations into fewer available channels, displaced LPTV stations will have limited options for continued over-the-air operation after repacking is completed, and many LPTV stations will likely be forced to abandon operations entirely.

According to the Commission's most recent tally, there are 1,984 low power television stations (excluding Class A stations) and 4,171 television translator stations.[139] Thus, the potential impact of the spectrum repacking is widespread.

Of particular interest, LPTV stations often provide network-affiliated programming or niche programming targeted to specific local interests, especially in smaller television markets or in more rural areas. Indeed, members of the Affiliates Associations operate LPTV stations affiliated with one of the ABC, CBS, FOX, or NBC television networks.[140]

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[137] *See Notice* at ¶¶ 118, 358.

[138] *Notice* at ¶ 358.

[139] *See* Federal Communications Commission, *News Release*, "Broadcast Station Totals As of December 30, 2012" (Jan. 11, 2013).

[140] Examples include WVAW-LD, Charlottesville, Virginia, an ABC affiliate; WILM-LD, Wilmington, North Carolina, a CBS affiliate; KXPI-LD, Pocatello, Idaho, a FOX affiliate; and KAGS-LD, Bryan, Texas, an NBC affiliate. Members of the Affiliates Associations also operate LPTV stations affiliated with the CW, MyNetwork, Azteca, and Telemundo television networks.

A. Further Study and Analysis of the Impact of Repacking on LPTV Stations Is Needed

At present, the impact of spectrum repacking on LPTV stations is unclear, as the *Notice* is proposing a spectrum clearing process that is fluid in nature. Depending on the demand for spectrum in the forward auction and the supply of spectrum vacated by existing television licensees, there is the potential for the displacement of literally thousands of LPTV stations. LPTV stations will be displaced not only because some of the channels they operate on are rebanded but also because full power and Class A stations will displace them in the new core of television frequencies.

Given these uncertainties, further study and analysis of the likely impact of repacking on LPTV stations is needed at a future point when more is known about the effects of spectrum repacking. It would be premature and precipitous for the Commission to take action now that could have such dramatic impacts on this important service without better understanding what those impacts may be.

The Spectrum Act requires the Commission to "make all reasonable efforts to preserve . . . the coverage area and population served of each broadcast television licensee, as determined using the methodology described in OET Bulletin 69 of the Office of Engineering and Technology of the Commission."[141] While this provision applies only to full-power and Class A stations,[142] this statutory directive reflects the congressional intent to preserve the public's broadcast service. Certainly, there is no express directive in the Act for the Commission to

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[141] Spectrum Act, § 6403(b)(2).

[142] *See* Spectrum Act, § 6001(6) (definition of "broadcast television licensee").

displace LPTV stations on a wholesale basis as result of the spectrum repacking process. There is no question but that LPTV stations remain secondary stations under pre-existing rules of the Commission,[143] yet the fact that LPTV stations must yield, under existing rules, where interference is caused to full-power or Class A operations does not imply that such stations do not have existing rights to operate or that they do not provide valuable services to the public. Indeed, at the recent hearing before the House Energy and Commerce Committee on the implementation of the Spectrum Act on December 12, 2012, Representative Joe Barton expressed his understanding that the intention of Congress in the Spectrum Act was to protect *all* licensed TV broadcasters, including LPTV stations.[144]

B. At the Appropriate Time, the Commission Should Adopt LPTV Station Displacement Procedures Similar to Those Previously Adopted in Connection with the Digital Transition

Under the Commission's existing rules, a displacement application for a new channel must demonstrate interference caused to or received from a primary station and may be submitted only after the primary station obtains a construction permit or license.[145] During the

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[143] *See, e.g.*, Spectrum Act, § 6403(b)(5) ("Nothing in this subsection shall be construed to alter the spectrum usage rights of low-power television stations.").

[144] *See Keeping the New Broadband Spectrum Law on Track: Hearing Before the House Energy and Commerce Committee* (Dec. 12, 2012) (statement of Rep. Joe Barton), *available at* <http://energycommerce.house.gov/hearing/keeping-new-broadband-spectrum-law-track> (beginning 1:25:22) ("I didn't envision that we would have the end result that a low-power television station would simply end up off the air. And so, I would like to ask the Chairman and the other Commissioners if, in fact, you are willing to commit that low-power television stations that have acted in good faith—they understand that they might have to move, or be repacked—but I personally believe it's not fair at all if the end result is that a low-power television station, that has been a good licensee, ends up totally off the air.").

[145] *See* 47 C.F.R. § 73.3572.

DTV transition, the Commission allowed LPTV stations to submit displacement applications without satisfying these requirements,[146] and it prioritized the processing of such applications over that of previously-filed new station and modification applications filed by low power television and translator stations.[147]

At the appropriate time, the Commission should adopt measures similar to those the Commission used during the digital transition to address the potential impact on LPTV stations of the broadcast television spectrum reorganization.[148] In addition, the Commission should conduct a separate proceeding to consider selection priorities to minimize mutual exclusivity in displacement applications and to facilitate the provision of important over-the-air broadcast services.

Conclusion

For the foregoing reasons, the Affiliates Associations respectfully suggest that the Commission should implement the Spectrum Act in keeping with the foregoing analysis.

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[146] *See Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588 (1997), ¶ 141 ("in providing all full service TV stations with a second DTV channel, it will be necessary to displace a number of LPTV and TV translator operations, especially in the major markets").

[147] *See* 47 C.F.R. §§ 73.3572(a)(4), 74.787(a)(4).

[148] *See generally Notice* at ¶ 360.

Respectfully submitted,

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APPENDIX A

DTV Transition Equipment and Services Cost Data

The Affiliates Associations obtained cost data from several dozen of their member stations relating to various equipment expenses incurred during the DTV transition that may be relevant to similar types of expenses they may incur as a result of the repacking. The cost data obtained, together with equipment estimates provided by the National Telecommunications and Information Administration ("NTIA") for the Public Telecommunications Facilities Program ("PTFP") (discussed below), are provided in the accompanying table.

Station cost data reflect historical prices paid by stations throughout the decade-long DTV transition. Most expenses were incurred in 2008 or earlier, and, accordingly, need to be adjusted for inflation as well as expected demand during a compressed build-out period for the repacking. Understandably, not all stations categorized expenses the same way, and, thus, the data should be read as a general guide to the historical range of expenses incurred for a particular category of equipment. Many categories of expenses that should be eligible for reimbursement in the spectrum repacking process[1] are not included in the table below.

NTIA equipment costs, by contrast, reflect the fact that the PTFP supported only the minimum level of equipment required to keep an eligible non-commercial station's signal on the air. As argued in the comments,[2] the Spectrum Act's "reasonably incurred" costs standard should not be applied in so strict a manner. The NTIA estimates, last updated on January 12, 2011, are taken from tables provided by NTIA at http://www.ntia.doc.gov/legacy/otiahome/ptfp/

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[1] *See* Comments of NAB at Section V.D & Appendix A.

[2] *See* Section IV.C.

application/EquipCost_TV.html. NTIA provides separate estimates, or ranges of estimates, for average facilities for low VHF, high VHF, and three different power levels for UHF stations. These have been converted to a minimum, maximum, and average cost for each category.

As explained in the comments,[3] the Affiliates Associations endorse the recommendation of NAB that the Commission utilize the services of a third-party administrator. Such an administrator, with industry input, could develop a schedule of expenses that could prove helpful in determining whether particular expenses incurred for certain categories of equipment are *prima facie* reasonable, whether an expense claim requires further documentation, or whether a claim should be subject to audit.

[3] *See* Section IV.B.

Table of DTV Transition Equipment and Services Cost Data

	Station Survey Results			NTIA		
	Minimum	**Maximum**	**Average**	**Minimum**	**Maximum**	**Average**
Tower	70,000	2,040,215	864,808	2,300,000*	2,300,000*	2,300,000*
Transmitter	124,927	2,622,926	938,447	325,000	950,000	607,000
Transmitter upgrade	116,872	834,000	502,145			
Transmitter installation	25,000	756,000	390,500			
Transmission line	9,987	165,000	81,708	85,000	340,000	156,000
Repacking transmitter	259,301	912,000	585,125			
Backup transmitter	95,000	404,836	185,680			
Antenna	49,780	1,477,300	453,373	200,000	375,000	255,000
Backup/temporary antenna	23,536	915,526	331,000			
Antenna/Line Installation	44,022	290,000	157,721	140,000	225,000	179,000
Repacking line additions	11,572	11,572	11,572			
Exciter	1,943	235,000	111,000			
Mask filter	133,665	133,665	133,665			
Combiner				50,000	75,000	57,000
Transmitter remote control	14,734	14,734	14,734	25,000	35,000	29,000
Ice bridge	8,000	18,800	13,400			
STL equipment	100,000	170,000	127,774	150,000	150,000	150,000
Test equipment	60,000	66,625	63,313	120,000	120,000	120,000
Proof of performance testing	10,000	53,432	28,396	8,000	10,000	9,200
Electrical	10,000	349,000	162,461			
Transmitter UPS/generator	197,000	245,000	221,000	25,000	100,000	**
Building and Improvements	69,988	844,752	245,238			
Transmitter building electrical	100,000	100,000	100,000	20,000	65,000	35,000
Transmitter building HVAC	21,053	182,782	76,479	10,000†	30,000†	20,000†
Engineering services	3,300	15,056	8,621			
Tower engineering studies	5,000	17,190	8,798			
RF engineering studies	2,300	15,000	9,100			
Building permits/fees	4,000	4,000	4,000			
FCC attorneys' fees	5,000	6,250	5,625			
Moving expenses	7,989	7,989	7,989			
Medical notifications	6,000	6,000	6,000			

* Includes tower, foundation, and installation
** Range given is cost dependent upon transmitter power and air conditioning need; thus, there is no average
† Estimates are for ducting and forced air system only, not HVAC equipment itself

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ENGINEERING STATEMENT IN SUPPORT OF COMMENTS
BY THE AFFILIATES ASSOCIATIONS
IN THE MATTER OF EXPANDING THE ECONOMIC
AND INNOVATION OPPORTUNITIES OF SPECTRUM
THROUGH INCENTIVE AUCTIONS
DOCKET NO. 12-268

I. Introduction

The instant Engineering Statement has been prepared on behalf of the Affiliates Associations in support of their Comments in Docket No. 12-268. The Affiliates Associations are ABC Television Affiliates Association, CBS Television Network Affiliates Association, FBC Television Affiliates Association, and NBC Television Affiliates. Hereafter, the Comments of the Affiliates Associations will be referenced as the "Joint Comments".

II. Coverage Area, OET Bulletin 69 Methodology and Importance to Repacking

The NPRM describes several different options for interpreting the terms "coverage area" and "population served." In turn, the procedure of how interference should be treated comes into play. In paragraph 105 and succeeding paragraphs through paragraph 110, the FCC invites comments on three interference interpretation options. The first is dubbed the "flexible" interference option; the second is dubbed the "fixed" interference option, and the third is a refinement of the fixed interference option that is here dubbed the "alternate fixed interference" option. From a technical perspective—i.e., to maximize the objective of facilitating a repacked station's ability to continue to maintain the same coverage area with the same viewers—option 2, the fixed interference interpretation, is the logical choice.

All the Affiliates Associations' stations are network affiliates. The stations are in competition with one another within their respective DMAs. A network affiliated commercial TV station, under the flexible interference option (i.e., option 1), could be repacked on another channel in a manner that retains the same number of persons served (within the proposed no greater than 0.5% permissible population reduction change

tolerance) before repacking, while otherwise complying with the FCC interference protection and principal community service requirements, using the prescribed OET Bulletin 69 prediction methodology, but on the new channel, may receive interference in areas that were served prior to repacking. If the new areas of interference are inside the station's DMA, it will lose whatever competitive parity it had relative to other market area stations that did not have to modify their facilities.

On the other hand, under the fixed interference option (i.e., option 2), a station would be assured of serving the same persons and area on the new re-packed channel as before repacking. The station would not suffer a possible adverse competitive or economic impact. Figure 1 in the Joint Comments illustrates this scenario, and the text expands on this matter.

The third option, the alternate fixed interference approach, would countenance interference only from the same station(s) and to the same extent as existed before February 22, 2012. In recognition of the considerable constraint that this third option would have on repacking facilities, the Commission proposes to permit up to 2% new interference for stations that did not interfere with one another on February 22, 2012. The add-on 2% new interference option would effectively make this third option an emulation of the flexible interference option.

On balance, the Affiliates Associations favor the second, fixed interference option because of its superior characteristics. This interference option comes closest to fulfilling the Congressional intent of preserving existing service. Adoption of the first, or third, option—i.e., the flexible interference option or the alternate fixed interference option—could lead to further undesirable service disruptions especially considering that many stations, when they converted to digital operation, were allowed to suffer new population

losses of up to 2%, without regard to whether the interference was from a new source, or not, and in some instances, up to an aggregate of 10% new interference was countenanced.

The OET Bulletin No. 69 methodology for evaluating a station's coverage has been the mainstay for the conversion of analog stations to digital. The Bulletin provides the procedures for "Evaluating TV Coverage and Interference" using the Longley-Rice methodology. The terms "service" and "coverage" are used interchangeably. Section I of the Bulletin explains how to evaluate "Service," Section II of the Bulletin explains how to evaluate interference, and Section III of the Bulletin explains the details of the Longley-Rice computer program.

For digital television stations, service is evaluated inside field strength contours that have values that have been determined to be adequate for providing service depending on the frequencies employed. The signal strength value employed for a UHF digital station corresponds to the noise limited value for the frequency of operation. The distances to the prescribed contours are determined using the Longley-Rice prediction methodology.

The procedure recognizes that intervening terrain obstructions can result in field strength levels within the defined contour limiting service area being less than needed for satisfactory reception. Thus, the calculation procedure for determining service takes terrain factors into account. The same basic procedure holds true for high and low band VHF digital stations except that a single field strength value, 36 dBu, F(50,90), is used to define the range of coverage and service therein for stations operating on Channels 7-13 and a single field strength value, 28 dBu, F(50,90), is used to define the range of coverage and service therein for stations operating on Channels 2-6.

As explained in OET Bulletin No. 69, interference is determined only after service within the defined limiting service contour, as limited by terrain, has been determined. Thus, the determination of the service area takes into account terrain factors which reduce the available signal strength at each affected cell within the noise limited contour below the level established for satisfactory reception. Afterwards, existing interference is evaluated only to cells that were previously determined to be served. In other words, the net coverage, or service, provided by a station takes into account areas within the confines of the noise limited contour that do not receive adequate signal strength for satisfactory service due to terrain losses. Interference from other existing stations is then determined. New interference is determined only after pre-existing interference has been evaluated. Interference within a given cell, even from different sources, is considered to be non-duplicative.

For the option 1 and option 2 interference determination methodologies, the FCC is proposing an interference population percentage level change of no more than 0.5, which is the equivalent of 0% when rounded down to a whole integer. From an engineering perspective, this rounding procedure is a reasonable and logical approach.

Finally, for the option 1 interference determination methodology, the NPRM seeks comment on whether it is consistent with the Spectrum Act to consider a station's signal to be receivable at all locations within its noise limited contour. This latter proposal clearly is contrary to the OET Bulletin No. 69 procedure since it does not take into account the effects of terrain in causing reduced signal strengths within portions of the defined service limiting contour.

Insofar as service replication is concerned for stations that must endure repacking, the NPRM proposes that a station assigned to a new channel can continue to use its

existing antenna pattern, with an adjustment in power level so that the area in total square kilometers is the same pre- and post- repacking. The NPRM also would allow stations to propose alternative facilities, so long as they do not extend the coverage area or cause new interference. It is important to understand, however, that differences in propagation characteristics between channels means that use of the same antenna pattern on the new channel may result in new facilities that do not truly replicate the station's former coverage area.

Also, most antennas are functional over a limited frequency range. A station with such an antenna that is repacked to a channel that is more than a few channels removed from its pre-packed channel, likely will be required to purchase a new antenna in any event. If the pre-packed antenna was directional, the replacement antenna may not have exactly the same radiation pattern on the new frequency as on the original pre-packed frequency. This matter could be an additional obstacle to achieving service replication. Thus, some additional leeway should be afforded to such stations to achieve service replication.

Under option 2, only the interference between station pairs is required to establish compliance with the less than 0.5% interference constraint. A station could be subjected to service diminutions from a multiplicity of stations, and the loss from each contributing station could comply with the less than 0.5% loss constraint. The aggregate of such losses could be much greater than 0.5%. Thus, in order to provide a safety net limit, the Affiliates Associations support the NAB proposal to cap the aggregate of such new interference to any station to 1%.

A procedure for evaluating compliance with the less than 0.5% new population received interference replication constraint under the Affiliates Associations' preferred

fixed interference option 2 is offered. The prior to repacking and post- repacking interference-free service populations and areas would be determined. The Longley-Rice calculation procedure, as implemented by the FCC, if not already programmed to do so, can be modified to yield the identities of cells and the populations therein that are subject to interference from a station. (The commercially available version of the Longley-Rice program employed by the undersigned has this feature.) The interference listing identifies the station causing the interference, the cell identification number, and the population of the interfered with cell. A tally of the number of persons affected by interference from each interfering station for the pre and post packing frequencies would be used to determine if the "not greater than 0.5%" interference constraint has been met.

As an example, assume that it is desired to determine if the interference received by repacked Station A on Channel 15 is within the 0.5 %, same persons limit for compliance under option 2. The first step would be to determine the existing pre-packed service and interference for Station A on its assumed pre-packed Channel 42. Similar information would be derived for the prospective operation on Channel 15.

Since the stations causing interference on Channel 15 are not the same as on Channel 42, a means is needed for determining if the same cells are involved in the interference determinations for Channels 15 and 42. It should be possible to index the cells for the two channels and compare the interference cell identifications tally on Channel 15 with the similar tally for Channel 42 to determine if the "not greater than 0.5%" limit is satisfied. If the interference cells for Channel 15 are not indexed exactly with the channel 42 cells, there could be an error in establishing the percent interference differential between the proposed Channel 15 operation and the present Channel 42 operation.

III. Channel 51 Stations

The FCC imposed a freeze on the submission of changed facility proposals for stations operating on Channel 51 that would propose increases in their service areas. All told, there are only fourteen Channel 51 stations that are not operating with maximum permissible facilities. The stations are KCEC, Denver, CO (900 kW/232.5 m); WBIF, Marianna, FL (50 kW/254 m); WSST-TV, Cordele, GA (91 kW/110 m); WFXG, Augusta, GA (Appl. 37 kW/363 m); WLAJ, Lansing, MI (900 kW/300 m); KFXL, Lincoln, NE (14 kW/125 m); WNJN, Montclair, NJ (Lic. 200 kW/233 m; C.P. 443 kW/237 m); WKEF, Dayton, OH (515 kW/351 m); KOHD, Bend, OR (84.1 kW/205.7 m); WTAE-TV, Pittsburgh, PA (1000 kW/273m); WRFB, Carolina, PR (Lic. 16 kW/563 m; C.P. 256 kW/563 m); WPXX-TV, Memphis, TN (1000 kW/298 m); KCEB, Longview, TX (500 kW/379 m); and KTFN, El Paso, TX (250 kW/525 m).

IV. Challenges and Importance of International Coordination Prior to New Table of Allotments

Another important consideration for the successful implementation of any repacking plan is the attainment of modifications to outstanding international agreements with Canada and Mexico. A non-exhaustive review of usage near the U.S.–Canada boundary, and near the U.S.–Mexico boundary suggests that for the re-packing plan to succeed, there will be a need to renegotiate many of the allotments on both sides of the respective borders. Just as during the decade-plus long DTV transition, when certain stations suffered significant delay as a result of the concurrence process with the Canadian and Mexican governments, international coordination has the potential to hinder the repacking of affected stations following the spectrum auction. Consequently, the importance of renegotiating the international agreements prior to the issuance of a new Table of Allotments will further the objectives of the NPRM.

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